(26,484, 26,485)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1017.

CHARLES T. SCHENCK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 1018.

ELIZABETH BAER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 22, 1918.

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1 Docket Entries in the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB R. ROOT, and WILLIAM J. HIGGINS.

Francis Fisher Kane. Henry J. Gibbons. Henry John Nelson. Morris Hilquit.

Sept.	15, 1917.	True Bill.
"	17, "	Defendant Charles T. Schenck being arraigned pleads "Not Guilty."
"	17, "	Order authorizing Clerk to take the recognizance of defendants other than Chas. T. Schenck in $2,500 each, filed.
"	17, "	Motion of U. S. Atty. for Bench Warrant for Elizabeth Baer filed.
"	17, "	Order allowing Bench Warrant for Elizabeth Baer filed.
"	17, "	Motion of U. S. Atty. for Bench Warrant for Charles Sehl.
"	17, "	Order allowing Bench Warrant for Chas. Sehl filed.
"	17, "	Motion of U. S. Atty. for Bench Warrant for Jacob H. Root filed.
"	17, "	Order allowing Bench warrant for Jacob H. Root filed.
"	17, "	Motion of U. S. Atty. for Bench Warrant for Wm. J. Higgins filed.
"	17, "	Order allowing Bench Warrant for Wm. J. Higgins filed.
"	18, "	Bail Piece to Siegfried Fuld.
"	18, "	Recognizance of Elizabeth Baer with Julius D. Love as bail in $2,500 for said Elizabeth Baer's appearance on Sept. 19, &c., taken and filed.
"	19, "	Charles Sehl, Elizabeth Baer, Jacob H. Root, and Wm. J. Higgins being arraigned plead "Not Guilty."
"	19, "	Bond of Charles Sehl with Anton Lauardson, Benjamin Mostovoy and Esther M. Wolfe as bail in Two Thousand five hundred Dollars drawn ack. & filed.

" 19, " Bond of Jacob H. Root with Rudolph Freund and Gustave Konstauze as bail in $2,500 taken and filed.

" 19, " Bond of Wm. Higgins, Jr., with Angelo Cavaliere, Simon Yanklovetz and Simon Santz as bail in $2,500 taken and filed.

2

Dec. 18, 1917. Examination of Jurors on Voir Dire.

" 19, " Jury called (see minutes) and witnesses sworn.

" 20, " Trial continued and testimony taken.

" 20, " Verdict "Guilty" as to Charles T. Schenck and Elizabeth Baer with a recommendation of clemency and "Not Guilty" as to Charles Sehl, Jacob H. Root and William J. Higgins.

" 20, " Order authorizing Clerk to take recognizance of Chas. T. Schenck in $5,000 filed.

" 20, " Order authorizing Clerk to take recognizance of Elizabeth Baer in $2,500, filed.

" 20, " Recognizance of Chas. T. Schenck with Wm. Silverman as bail in $5,000 drawn, acknowledged and filed.

" 20, " Recognizance of Elizabeth Baer with Wm. Silverman as bail in $2,500, drawn, acknowledged and filed.

" 22, " Motion for new trial on behalf of Chas. T. Schenck and Elizabeth Baer filed.

Jan. 26, 1918. Argued sur motion for new trial.

Mar. 1, 1918. Opinion, Thompson, J., denying Motion for New Trial filed.

" 6, " Bill of Exceptions filed.

" 6, " Order sealing Bill of Exceptions filed.

" 21, " Sentence: Elizabeth Baer—imprisonment in Philadelphia County Prison for ninety days from this eleventh day of March, 1918, and fine of Five Hundred Dollars and costs of prosecution. Charles T. Schenck—imprisonment in Mercer County Jail, Trenton, N. J., for six months from this eleventh day of March, 1918, and pay costs of prosecution.

" 21, " Assignments of Error on behalf of Charles T. Schenck filed.

" 21, " Petition of Charles T. Schenck for Writ of Error filed.

" 21, " Order fixing amount of bail bond, pending Writ of Error, at $5,000, filed.

Order of Court allowing Writ of Error filed.

Bond of Charles T. Schenck sur writ of error in sum of $5,000 with William Silverman surety, filed.

Bond of Charles T. Schenck for costs sur writ of error in sum of $250 with William Silverman surety, filed.

Order approving bond for costs of Charles T. Schenck, sur writ of error filed.
Writ of Error on behalf of Charles T. Schenck allowed, and copy thereof lodged in Clerk's office for adverse party.
3 Citation on behalf of Charles T. Schenck issued.

Mar. 21, 1918. Assignments of Error on behalf of Elizabeth Baer filed.
" 21, " Petition of Elizabeth Baer for Writ of Error filed.
" 21, " Order fixing amount of bail bond pending writ of error at $2,500, filed.
Order allowing writ of error filed.
Bond of Elizabeth Baer sur writ of error in sum of $2,500 with William Silverman surety, filed.
Bond of Elizabeth Baer for costs sur writ of error in sum of $250, with William Silverman surety, filed.
Order approving bond for costs of Elizabeth Baer, sur writ of error filed.
Writ of Error on behalf of Elizabeth Baer allowed and copy thereof lodged in Clerk's office for adverse party.
Citation on behalf of Elizabeth Baer issued.
Mar. 23, 1918. Citation on behalf of Charles T. Schenck returned "service accepted" and filed.
" 23, " Citation on behalf of Elizabeth Baer returned "service accepted" and filed.
Apr. 4, " Præcipe for transcript of record filed.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and Charles T. Schenck, defendant, a manifest error hath happened, to the great damage of the said Charles T. Schenck, defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia the 21st day of March in the year of our Lord one thousand nine hundred and eighteen.

[Seal of the District Court of the United States, E. D. Penna.]

GEORGE BRODBECK,
Clerk of the District Court U. S.

Allowed by
J. WHITAKER THOMPSON,
District Judge.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and Elizabeth Baer, defendant, a manifest error hath happened, to the great damage of the said Elizabeth Baer, defendant, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

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ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution . . shall be the *supreme law of the Land.*"

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land. when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.
Remember, "eternal vigilance is the price of liberty.
Down with autocracy!
Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

6 District Court of the United States, Eastern District of Pensylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT and WILLIAM J. HIGGINS.

Indictment.

Filed Sept. 15, 1917.

Count 1.

The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectively do present, that heretofore, to wit, on August 13, 1917, at Philadelphia, in the Eastern District of Pennsylvania, and on divers dates thereafter, Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins (hereinafter called the defendants) did knowingly, wilfully and unlawfully conspire together and with other persons to this Grand Inquest unknown, to violate certain provisions of Section 3 of Title I of an Act of Congress, approved June 15th, 1917, entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States and for other purposes," to wit: when the United States was at war did wilfully cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, to the injury of the United States, to wit: when the United States was at war with the German Empire, they did wilfully conspire to have printed and circulated copies of the following circular, to wit:

(Here follows reproduction of circular marked p. 7.)

8 to men who had been called and accepted for military service under the provisions of the Act of May 18, 1917, which said circular was calculated, when so distributed, to cause insubordination, disloyalty, mutiny and refusal of duty in the said military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, to the injury of the United States.

And, thereafter, in order to effect the object of the said conspiracy:

1. On, to wit: August 13, 1917, at Philadelphia aforesaid, the said defendants, as members of the Executive Committee of the Socialist Party, did, at a meeting of the said Committee adopt a resolution of the following nature, to wit:

"M. and S. 15000 leaflets to be written to be printed on the other side of leaflet—now in use—to be mailed to men who have passed the exemption board, also distribution.

"M. and S. Secretary get bids on price of leaflets."

2. On, to wit: August 20, 1917, at Philadelphia aforesaid, at a further meeting of the said Executive Committee the said defendants did join in approving the minutes of the aforesaid meeting held August 13, 1917, wherein the resolution aforesaid was set forth as moved and seconded and did provide for the taking of certain action in furtherance of the aforesaid resolution, to wit:

"M. and S. That Comrade Schenck be authorized to spend $125. for sending leaflets through the mail. Carried."

3. On, to wit: August 16, 1917, at Philadelphia aforesaid, the said Charles J. Schenck, pursuant to the said resolution of August 13, 1917, did direct the printing of the circular aforesaid, and did direct the purchase of stamped envelopes for the purpose of distributing the said circulars through the mails;

4. On, to wit: August 18, 1917, and on divers dates there-
9 after, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises at 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia.

5. On, to wit: August 20, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises of 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia, and for the purpose of having the said circulars mailed to men who had been called and accepted for military service: contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Count 2.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, as aforesaid, do further pre-

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Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

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Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped: so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

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(OVER)

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Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

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Down with autocracy!
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1326 ARCH ST. Phone, Filbert 3121

(OVER)

sent that heretofore, to wit: on August 13, 1917, at Philadelphia, in the Eastern District of Pennsylvania, Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins (hereinafter called the defendants) did knowingly, wilfully and unlawfully conspire to commit an offense against the United States: to wit: to use and attempt to use the mails and postal service of the United States for the transmission of matter declared to be non-
10 mailable by Section 2 of Title XII of an Act of Congress, approved June 15, 1917, entitled "An act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes, to wit: certain circulars which were in violation of Section 3 of Title I of said act, in that they were calculated to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, to the injury of the United States, and which said circulars were in effect, as follows, to wit:

(Here follows reproduction of circular marked p. 11.)

12 And, thereafter, in order to effect the object of the said conspiracy:

1. On, to wit: August 13, 1917, at Philadelphia aforesaid, the said defendants, as members of the Executive Committee of the Socialist Party, did, at a meeting of the said committee, adopt a resolution of the following nature, to wit:

"M. and S. 15000 leaflets to be written to be printed on the other side of leaflet—now in use—to be mailed to men who have passed the exemption board, also distribution."

"M. and S. Secretary get bids on price of leaflets."

2. On, to wit: August 20, 1917, at Philadelphia aforesaid, at a further meeting of the said executive committee the said defendants did join in approving the minutes of the aforesaid meeting held on August 13, 1917, wherein the resolution aforesaid was set forth as moved and seconded and did provide for the taking of certain action in furtherance of the aforesaid resolution, to wit:

"M. and S. that Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried."

3. On, to wit: August 16, 1917, at Philadelphia aforesaid, the said Charles T. Schenck, pursuant to the said resolution of August 13, 1917, did direct the printing of the circular aforesaid and did direct the purchase of stamped envelopes for the purpose of distributing the said circulars through the mails;

4. On, to wit: August 18, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, for the mailing of the said circulars to persons whose names are to this Grand Inquest unknown, entering on the premises at 1326 Arch Street, Philadelphia, which said prem-

13 ises constitute the headquarters of the Socialist Party in Philadelphia;

5. On, to wit: August 20, 1917, and on divers dates thereafter, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises of 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia, for the purpose of having the said circulars mailed to men who had been called and accepted for military service:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Count 3.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their oaths and affirmations as aforesaid, do further present that heretofore, to wit: on August 20, 1917, at Philadelphia aforesaid, the said Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins (hereinafter called the defendants) did knowingly, wilfully and unlawfully use and attempt to use the

ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the *supreme law of the Land.*"

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped, so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article 1, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot us the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

LONG LIVE THE CONSTITUTION OF THE UNITED STATES

Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.
Remember, "eternal vigilance is the price of liberty.
Down with autocracy!
Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

mails and postal service of the United States for the transmission of mail matter declared to be non-mailable by Title XII of an Act of Congress, approved June 15, 1917, entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage and better to enforce the criminal laws of the United States, and for other purposes," to wit: certain circulars of the following tenor, to wit:

(Here follows reproduction of circular marked p. 14.)

15 in that the said defendants did wilfully authorize and direct the said Charles T. Schenck to have printed the aforesaid circulars and to expend the sum of $125, for sending said circulars through the mail to men passed by the exemption boards and which said circulars were non-mailable in that they were in violation of the provisions of Section 3, of Title I, of the aforesaid Act of June 15 1917, in that said circulars were calculated to cause insubordination disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, to the injury of the United States: contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

(Sgd.) FRANCIS FISHER KANE,
United States Attorney.

Philadelphia, Pa., 4 September, A. D. 1917.

16 [Endorsements:]

Com. Return No. —. of 191–.

And now, this 17th day of September, A. D. 1917, the defendant Charles T. Schenck being arraigned says he — not guilty in manner and form as he stand- indicted, and of this, etc.

And now, this 19th day of September A. D. 1917, the defendants Charles Sehl, Elizabeth Baer, Jacob H. Root, and William J. Higgins be- arraigned say they are not guilty in manner and form as they stand indicted, and of this &c.

The Attorney of the United States replies Similiter and issue.

Therefore, &c.

And now, this 20th day of December A. D. 1917 the jurors empaneled in this cause, upon their oaths and affirmations, do say that the defendants Charles T. Schenck and Elizabeth Baer are guilty in manner and form as they stand indicted. Recommendation for clemency.

Verdict not guilty as to Charles Sehl, Jacob H. Root and William J. Higgins.

No. 111. June Sessions, 1917.

District Court United States, Eastern District of Pennsylvania.

The United States of America vs. Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins.

True Bill. Augustus W. Hoff, Foreman.

Indictment: Conspiracy.
Filed Sept. 15, 1917. Wm. W. Craig, Clerk, by J. Deputy Clerk

Witnesses: John Rule, H. J. Koehler, Louis M. Passarello, Henry L. Aginley, Milton A. Butler, D. Gublebank, G. Hare, Jr., Joseph H. Smedley, E. J. Carr, Wm. C. Booker, L. F. Armstrong, Stewart A. Jellett, Oliva L. Snellbaker, Wm. J. Vandusen Stetson, Benjamin Morris, Joseph Seltz, Wm. J. Arendt, Sherman Crawford.
Sec. 3, Act June 15, 1917.

17 In the United States District Court for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES

vs.

CHARLES T. SCHENCK and ELIZABETH BAER.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Bill of Exceptions.

Be it remembered, That in the said term of June Sessions, 1917 came the said Plaintiff into the said Court, and impleaded the said Defendants in a certain plea of Conspiracy to violate Espionage Act &c., in which the said Plaintiff declared (prout narr.) and the said Defendants pleaded, (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable J. Whitaker Thompson, Judge of the said Court, the seventeenth day of December, 1917, the aforesaid issue between the said parties came to be tried by a Jury of the said County for that purpose duly impanelled (prout list of Jurors), at which day came as well the said Plaintiff as the said Defendants by their respective Attorneys; and the Jurors of the Jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue, and upon the trial the counsel of the said defendants noted the following exceptions:

18 Third day.

UNITED STATES

vs.

SCHENCK, et al.

Government's Evidence.

SAMUEL O. WYNNE, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. You are a postoffice inspector?
A. Yes, sir.
Q. Of the Federal Government?
A. Yes, sir.
Q. And you were an inspector during August of this year?
A. Yes, sir.
Q. During August of this year, did you receive a complaint concerning the mailing of a particular circular?
A. Yes, on August 27th of this —, we received a number of complaints of people who mailed their complaints in, addressed to the Postoffice Inspector, and other people came in in person and brought us letters that they had received through the mails, and the letter contained a circular which I have here and they complained as to the receipt of it.
Q. And this is one of the circulars that was sent in to you? (Paper handed witness.)
A. Yes.

Mr. Walnut: Now, I think I had better read the circular.
19 Mr. Nelson: I object to the reading of the circular at this time unless it is shown that it has some connection with the defendants.
Mr. Walnut: Very well, I will go ahead with my testimony.

By Mr. Walnut:

Q. And what did you do after you received that circular?
A. At the same time, or about the same time, on the same day, I also received complaint from various postoffice station superintendents in Philadelphia that a great number of these letters were being mailed through their stations. I directed them to hold the letters from mailing and send them into my office, and I received that pack of letters there, and there are some six hundred of them, I think, as I counted them.
Q. These are the letters (referring to bundle of papers)?
A. Yes.

Q. Then what was your next action?

A. The matter was then submitted to the United States Attorney and, by his direction, a search warrant was issued for the headquarters of the Socialist Party at 1326 Arch Street, as it appeared on this circular. With that search warrant and Mr. Cortelyou, the chief inspector, and Mr. Garbarino, the agent in charge of the department of Justice Agents, and I think two of his agents, and a Deputy United States Marshal, we went to the address here, 1326 Arch Street, on August 28th, the next day, about 5 o'clock
20 in the evening. At that address is a book store, which shows, by the sign, that it is operated by the Socialist Party in charge of a girl by the name of Clara Abramowitz, in charge of the store. In the rear of the store was an office, apparently the office of the Socialist Committees. In that office we found some eight or ten young men, and I have a list of their names here. These young men were questioned as to what their connection was with the place.

Q. Were any of them one of the five defendants?

A. No, not at that time. A little later on, Mr. Schenck, one of the defendants here, came in, and in his presence, these other young men, some of them said, "Here comes the little fellow and he will tell you all about it," that he had charge of the place. Mr. Schenck came in and told us his name was Schenck, that he had charge of the place and he was the general secretary of the Socialist Party. We asked him—first we told him we had a search warrant for his place, and Mr. Cortelyou picked out various documents and books and asked Mr. Schenck what they were and he identified them. Among other things, we found a book that you will find on the table there.

Q. Did he say what he was?

A. He said he was the general secretary of the Socialist Party. Among the other things we found that book, which is a copy of the minutes, and Mr. Schenck identified it as the minutes of the Executive Committee of the Socialist Party.

Q. Is this the book you are referring to (book shown witness)?

A. Yes. We also found these three bundles of circulars
21 that are there.

Q. This bundle here (referring to bundle of papers)?

A. Yes. They were piled in the front of this inner office, on a table, and apparently they were the same circular as the one that I had that had passed through the mails. We asked Mr. Schenck where he had had these circulars printed and he said at the Jewish World. We asked him how many he thought he had printed and he said about fifteen or sixteen thousand. We asked him if he was distributing them from there and he said they were there for anybody who wanted to come in and take them. Among other things, we found a great many newspaper clippings in a case on the wall, containing the names of men who had been called in the draft.

Q. Are these the newspaper clippings (clippings shown witness)?

A. Yes, and the one you have in your hand also was found
that same time.

Q. This one?

A. Yes, this clipping here.

Q. I was going to ask you about this last clipping. Did yo
ever compare the names shown on that clipping with the envelop
you had stopped?

A. Yes, I have compared this particular list with some of then

Mr. Nelson: I object to the question. Your Honor, I haven
made any objection to this line of testimony until just now, but
think the question will come up and I would like you
22 Honor to rule upon it and it is this. I object to the intr
duction of any testimony that was taken on the search wa
rant on the ground that it might tend to convict the defendant
on the ground that they cannot be made to testify against then
selves and I object to any testimony as to what the defendants sai
to the officials of the government, unless they were first warned tha
whatever they said would be used against them. Those two ob
jections I now make.

The Court: I understand the objection is merely academic
this time.

Mr. Nelson: No, I object to this particular question as being pu
to Mr. Wynne, as to what these names were that they found in th
back store, or what he did with them or what was the result of h
comparing them with something else and so forth.

Objection sustained.

The Court: I sustain the objection under the present status of th
evidence.

Mr. Walnut: We will then merely have to recall Mr. Wynn
after we have called the various witnesses in reference to the
envelopes.

By Mr. Walnut:

Q. Then, what else happened there?

A. That was practically all that happened there. We brough
down these records to the postoffice building and the Ma
shal arrested Mr. Schenck at that time and brought hi
23 down. A little later, about September 12th, I called on D
Baer, who is one of the defendants now, although she wa
not at that time, in her office, at 129 South 18th Street, I believ
in this city, and I told Dr. Baer who I was and my official positio
and showed her my commission. I had with me at that time th
minutes which were taken out of this book of the meetings
August 20th and August 13th, and those four pages which are th
typewritten minutes and also the longhand minutes of the sam
meeting. I had those with me. I told Dr. Baer that I would lik
to ask her about these minutes, and she looked at them and sai
these were hers.

Mr. Nelson: I object unless it is first stated that the witness cautioned Dr. Baer that if she made any statement she made it with the knowledge that it might be used against her.

Mr. Walnut: I think, if the court please, when Mr. Wynne states he is the Postoffice Inspector and that he has come to inquire about these particular articles, if he said no more than that, that that is sufficient notice.

The Court: I don't understand the defendant was in custody at that time.

Mr. Walnut: There was no question of custody at that time.

The Court: If there is anything to show that she did not make a voluntary statement, you may show it. I will allow the
24 defense to cross examine the witness.

By Mr. Nelson:

Q. Mr. Wynne, did you caution Miss Baer before you asked her these questions, and before she answered you, that anything she might say might be used against her?

A. No, sir. I told her I was a Postoffice Inspector and showed her my commission.

By Mr. Walnut:

Q. You told her what you had come there for?

A. Yes, sir.

Mr. Nelson: I made the objection, and I understand your Honor has overruled it.

Objection overruled. Exception noted for the defendants by direction of the court.

The Witness: Dr. Baer looked at these two long-hand sheets and said that was her handwriting of the minutes of these two meetings, and the four typewritten pages I had were the minutes of the same meeting. I asked her who were on the Executive Committee of the Socialist Party, and she said before she answered she would like to call up her attorney to get his advice about answering, and I told her, "All right," and she called up some one on the telephone and called him Mr. Nelson, and she told this party on the telephone that Mr. Wynne of the Postoffice Department was there and had the minutes of the meetings of August 20th and August 13th and wanted her to tell him as to who were on the executive committee, and who made certain motions. She hung up the receiver and then
25 said her attorney advised her not to talk to me. I told her that was perfectly all right, that she should be guided by whatever her attorney told her, and I wasn't there, I suppose, over five or ten minutes.

Recess until 1.30 P. M.

1.30 P. M., Wednesday, December 19th, 1917.

Present: Parties as before noted.

SAMUEL O. WYNNE, resumed.

By Mr. Walnut:

Q I don't just recall what you stated about your conversatio with Mr. Schenck with reference to these circulars. Will you sta what conversation you had with him about the circular, if any?

A. When he was identifying various records, he was asked as what they were and he said they were some circulars——

Mr. Nelson: I object. The reason for my objection is that unle Mr. Wynne, having then a warrant for Mr. Schenck, cautioned hi that anything he said might be used against him, that whatever M Schenck said could not be used in evidence now.

By Mr. Walnut:

Q. Will you state if you did caution Mr. Schenck?

26 A. We did not, but he called up his attorney and can back and told us that his attorney told him not to talk, b he continued to talk and naturally we continued to listen. We co sidered that notice enough.

By the Court:

Q. Was that on the occasion when you arrested him?

A. Yes, sir.

Objection sustained.

By Mr. Walnut:

Q. Now, Mr. Wynne, I would like you to turn to the minutes th appear in this book for the two dates mentioned by you.

A. All right. (Witness turning to book.)

Q. What are those dates?

Mr. Nelson: I object.

The Court: He is just testifying as to the dates.

The Witness: Minutes of August 13th an*f* the minutes of Augu 20th.

Mr. Walnut: If the court please, I would like to offer the minut of these two dates in evidence.

Mr. Nelson: I object to the offer of such testimony, as it is well settled rule of law that any one accused of crime cannot be ma to testify as against himself, and even though he testified after bei duly cautioned that anything he said might be used against hi and as was held within six months or a year in a celebrated case New York that where government officials seized papers or boo

belonging to a man who afterwards becomes a defendant on
27 a criminal charge, they cannot be used against him any more than his own words could be used against him, or, in other words, it is but a round-about way of trying to make a man convict himself. That case was afterwards brought up to the Supreme Court and the Supreme Court held that while apparently, from all the testimony in the case, the man was guilty, still the methods pursued in order to prove him guilty were wrong.

The Court: That depends very much on the nature of the evidence. Now, do I understand that these minutes involve anybody except Schenck and Dr. Baer?

Mr. Walnut: The entire minutes would, yes. The minutes taken entirely would.

The Court: Well, I will sustain the objection at the present stage of the testimony.

Mr. Walnut: Then, if the court please, I would like to offer in evidence the particular resolutions contained in these minutes and my thought in so doing is this, that in the proving of a conspiracy or an offense committed pursuant to a conspiracy, that the acts or declarations of any of the conspirators are proper evidence for submission. Now, I believe that a minute written pursuant to or in connection with a meeting, is an act or declaration by one or more of the conspirators and I think, on that ground, it is admissible.

The Court: Well, it is not admissible to prove the con-
28 spiracy.

Mr. Walnut: It is not admissible, we admit, to prove conspiracy in that particular resolution. We have offered the minutes as prima facia evidence of the conspiracy. We offer the particular resolutions as an act of declaration of the conspiracy.

The Court: You would have to prove the intention of any of the conspirators. I think this is premature. You had better proceed to establish your conspiracy before you attempt to prove the declaration of one against others.

Mr. Walnut: Of course, my first thought was this, that the minutes of the meeting are the best evidence that we have, or, so far as I can see, the best evidence securable of the persons who were present at the meetings. It was the record made at the time of the meeting and it is the very best evidence that I can conceive of who were present at the meetings and, for that purpose, I wanted to offer the entire record of the minutes of these two meetings, both to prove the conspiracy and to prove the acts pursuant to the conspiracy and that is the basis upon which I wanted to get the entire record in.

The Court: Well, I don't know that Mr. Nelson has made any objection based on those grounds. The point is as to the proving of the papers found under these conditions as against these defendants. That is your objection, isn't it?

Mr. Nelson: That is my objection. Then I have a further
29 objection. I don't know who made this record and, until something of that kind is shown, I would not know whether it was admissible in evidence to fasten guilt, if there is any guilt, on these defendants.

Mr. Wallace: Of course, we have already introduced in evidence if the Court please, the statement made by one of the defendants as to who made the records. She was the recording secretary and she made it as such. She was the only person who could properly identify the record.

The Court: The minutes are not evidence at the present stage of the case against the defendants whom you have not shown had any connection with it. As against the other two, they are.

Mr. Wallace: Then, if the court please, I would like to introduce particular resolutions referred to as evidence against the two defendants who have been connected with it, and then, if our further evidence does not support the connection of the other conspirators with it, we will then have to withdraw our case against the other three.

Mr. Nelson: I object to that on the same ground, that it is a round about way to have a defendant testify against himself in this matter.

The Court: Well, I will overrule the objection based on that ground.

Exception noted for defendants by direction of the court.

Mr. Wallace: I might state that the two resolutions that I wish to offer in evidence have a direct bearing upon the printing of the circular and the circulation of them, that is the leaflet referred to in the indictment.

The Court: They are set out in the indictment?

Mr. Wallace: Yes, sir.

Mr. Nelson: I have a further objection, your Honor, to the introduction of this testimony, because of the fact that the book referred to is a loose leaf book and it has already been testified to by this witness that some of the leaves, at least, were taken out of it, and there is nothing to indicate in a loose leaf book whether they were inserted before or after a certain date, or whether they run along chronologically with the dates in the book.

Mr. Wallace: Of course, I might state that the typewritten resolution is the same as the resolution in longhand, both resolutions or both minutes being identified by the recording secretary.

The Court: I think that would be evidence. I will overrule the objection.

Exception noted for the defendants by direction of the court.

By Mr. Wallace:

Q. Now, Mr. Wynne, will you read the resolution of August 13th and the resolution of August 20th?

A. "On August 13th there appeared here in the minutes under the heading 'New Business' the following:

"M. and S. that 17,000 leaflets be written to be printed on the other side of the leaflet now in use to be mailed to men who have passed exemption boards, also distribution.

M. and S. Secretary gets bids on price of leaflets."

"On August 20th, under the general secretary's report, it says

"Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing same" and, under unfinished business was, "M. and S. That Comrade Schenck be authorized to spend $125.00 for sending leaflets through the mail. Carried."

Mr. Nelson: Now, your Honor, I understood when this question was put that Mr. Walnut expected to connect this resolution with the particular pamphlet or circular which is the basis of this action. I move you, therefore, that that testimony be struck out, and the jury be instructed to pay no attention to it, unless Mr. Walnut is able to connect this particular pamphlet with this particular resolution. In other words, these resolutions as read "M. and S.," I suppose meaning, "moved and seconded," these particular resolutions, as read, might refer to a very harmless pamphlet or circular.

The Court: That motion is overruled at this time, with leave to renew it in case the situation arises. Of course, I cannot expect the District Attorney to prove his whole case by one witness
32 or by one question, so I will overrule the objection at this time and grant an exception to the defendants.

Mr. Walnut: I think this question was raised before and I will just ask Mr. Wynne the question and see how far we can proceed with it.

By Mr. Walnut:

Q. You found among the papers at 1326 Arch Street a number of newspaper clippings containing the names of men?
A. Yes.

Mr. Nelson: I object to that, your Honor, on the same ground, namely that it is a round about way to have people, by means of search made on their property, seizure of their paper, to convict themselves, when much better evidence by word of mouth would not be permitted.

Mr. Walnut: I think, if the court please, what we found is certainly evidence.

The Court: Of course, the witness cannot testify as to the contents of the papers if objected to. However, on the other ground, I don't think that arises, because the papers have not been produced.

By Mr. Walnut:

Q. Have you there the papers that you found at 1326 Arch Street?
A. Yes, sir.
Q. Will you take them out of the envelope and see what they are?

(Here follow reproductions of newspaper clipping and circular marked pages 32½ and 32¾.)

33 (Papers produced.)

Mr. Walnut: I would like to offer in evidence these papers found at 1326 Arch Street on August 28th, 1917.

Mr. Nelson: I object to the offer as already stated.

Objection overruled. Exception noted for defendants by direction of the court.

Papers offered in evidence are marked "Government's Exhibit No. 1, 12-19-17, W. E. M."

Mr. Walnut: I would also like to offer in evidence the circulars, stacks of circulars that were found there, which have already been identified.

The Court: Those that were found at 1326 Arch Street?

Mr. Walnut: Yes, sir.

Mr. Nelson: I object to this offer on the same ground.

Objection overruled. Exception noted for the defendants by direction of the court.

Circulars offered in evidence are marked "Government's Exhibits No. 2, 2-*a* and 2-*b*, 12-19-17, W. E. M."

By Mr. Walnut:

Q. You have some envelopes on this desk?
A. Yes.
Q. Have any of those envelopes been opened?
A. Yes.

Mr. Walnut: I would like to offer in evidence the contents
34 of this envelope.

Mr. Nelson: I object to the offer, certainly, at this time.

The Court: I don't understand what the envelope is.

Mr. Walnut: Will you read, Mr. Wynne, what is on the envelope?

The Court: The question is, where did he get the envelope.

By Mr. Walnut:

Q. Describe where you got the envelope?
A. These are four letters which were brought in by people who were complaining about receiving these letters through the mail.

Mr. Nelson: I object to the offer unless the witness can connect these particular envelopes and their contents with the defendants.

Mr. Walnut: Have you looked at the circular contained in these envelopes?

The Witness: Yes, sir.

Mr. Walnut: Have you compared it with the circular found at 1326 Arch Street?

Mr. Nelson: I object.

The Court: The question is entirely for the jury and not this witness. You cannot prove papers or contents of papers in that way.

Mr. Walnut: The question now is to identify them with
35 papers sent out from 1326 Arch Street.

The Court: I don't see anything in that except hearsay. There is no evidence at all to connect the defendants with these papers yet.

Mr. Walnut: Well, of course, the immediate connection of the defendants with these papers will be produced.

The Court: Then I think you are getting your cart before your horse, are you not?

Mr. Walnut: Well, we will withdraw Mr. Wynne and proceed to connect the defendants up with these papers.

Witness withdrawn.

The Court: Mr. Nelson, do you desire to cross-examine Mr. Wynne at this time or do you wish to wait until he is recalled?

Mr. Nelson: I think we shall save time by waiting until he is recalled and then cross-examine him.

JACOB AARON LAZAR, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. What is your business?

A. Printer.

Q. Were you engaged in the printing business last August?

A. Indirectly I was, yes, sir.

Q. What do you mean by indirectly?

36 A. Well, I didn't work at the printing place. I was soliciting for a printer.

Q. Do you know Mr. Schenck, one of the defendants here?

Mr. Nelson: I object, your Honor, to asking this witness that question, because, at the present time, he is under indictment on a similar charge to them that I represent him, and what he may say on the stand here might have a tendency to incriminate him.

Mr. Walnut: His mere acquaintance with Mr. Schenck will not incriminate him.

Mr. Nelson: I don't know, sir, how far it will go. Perhaps it would.

The Court: Well, if you want to cross examine the witness as to his being under indictment——

Mr. Nelson: He is under indictment.

Mr. Walnut: That is so.

Mr. Nelson: He is under indictment in another case of the same character.

The Court: Well, you will have to establish from the witness that he testifies voluntarily and whatever he says will be used against him.

By Mr. Walnut:

Q. You understand that whatever you testify to here will be used against you in the government case against you?
A. Yes.

By Mr. Nelson:

Q. And, Mr. Lazar, I instruct you, with the permission of the court, that, if in your opinion, any question that is
37 asked you may tend to incriminate you, you have a right to refuse to answer, subject always to what his Honor may instruct you.

By the Court:

Q. You understand that that is your right, do you, Mr. Lazar?
A. Yes, sir.

By Mr. Walnut:

Q. Did you see Mr. Schenck last August?

Mr. Nelson: For your Honor's information, I will say that this case is the next case on the list, so that you may not be confused.

By Mr. Walnut:

Q. Did you see Mr. Schenck last August?
A. I believe I did.
Q. Where did you see him?
A. Oh, various places.
Q. Did you see him at 1326 Arch Street, this city?
A. I suppose I have, yes.
Q. Did you go with him to the printing establishment of the Jewish World?
A. Did I go with him?
Q. Yes.
A. One time I did.
Q. How did you come to go there with him?
A. Well, I was soliciting for the Jewish World.
Q. Soliciting business?
38 A. Business for the Jewish World, and to me it didn't make any difference what sort of business it was. We were doing printing and a printer does anything that comes along the line.
Q. Do you remember who you saw at the Jewish World?
A. In regards to what?
Q. At the time you were there with Mr. Schenck?
A. At the time I went with Mr. Schenck, I believe we saw Mr. Smith.
Q. Did you have any conversation with Mr. Schenck, before you went there, concerning printing?
A. Only regarding the circular, that is all.

Q. Did he tell you what was in the circular?
A. No.
Q. What did he ask you to do after you had had your conversation concerning the circular?
A. He simply wanted to know where he could have these circulars done and I said the Jewish World was the proper place.
Q. Did you see the Jewish World?
A. No, not the Jewish World, Mr. Smith.
Q. Did you see him before you went there with Mr. Schenck?
A. I spoke to him over the phone.
Q. And what did you ask him?
A. I asked him regarding the size and price of the circular. Mr. Smith did not know, I don't suppose, and did not need to know the exact wording, nor neither did I. We only knew the size of the circular.
39 Q. But, afterwards, did you go down with Mr. Schenck to the office of the Jewish World?
A. Yes, I believe it was a day or two after.
Q. Do you remember when this was?
A. Not exactly.
Q. Do you remember what month?
A. I believe August.
Q. What conversation did you have with Mr. Smith at the time you went to the office of the Jewish World?
A. I simply told Mr. Smith that Mr. Schenck was here with the copy and that is all.
Q. Did you ever see the circular afterwards?
A. I believe in here, in the Postoffice.
Q. Have you been connected with the Jewish World for any length of time?
A. About five years, four or five years.
Q. Are you familiar with their type and their numbers? I show you a printed circular. Can you identify that as the work of the Jewish World or the printing establishment of the Jewish World?
A. Hardly.

Cross-examination.

By Mr. Nelson:

Q. What do you mean by "hardly"?
A. I said I could hardly identify it as the work of the Jewish World.
Q. Well, is it or is it not, in your opinion?
40 A. In my opinion, well, I would rather not say that. There may be some type that could be found in other printing shops or the paper may be found in other printing shops and I cannot say positively that this was done by the Jewish World.
Q. Well, does it look like it?
A. Does it look like Jewish World work?

Q. No, does it look like the circular you say was printed?
A. I saw it for the first time in the Postoffice.
Q. I didn't ask you that. I asked you does this paper which has been shown you look like the circular which had been printed by the Jewish World?
A. I hadn't seen the circular printed in the Jewish World at all until I got here in the Postoffice, when the evidence was brought here.
Q. Then, how do you know the paper you saw here, was the paper printed in the Jewish World?
A. I didn't say it was. I said I could hardly say.
Q. Then when you answered Mr. Walnut and said you identified these papers here as papers that were printed by the Jewish World and papers that you went there with Mr. Schenck to the Jewish World about, you made a mistake. Is that right?
A. I will say the way I answered the question. The question put to me, I believe, was, "Did you go with Mr. Schenck to order circulars," and I said, "Yes." I didn't say that these were the papers that were printed at the Jewish World.

41 Redirect examination.

By Mr. Walnut:

Q. How many circulars did you have printed at the Jewish World?
A. Well, that I don't remember. They were not ordered by me. I didn't order them.

THAD A. SMITH, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. What is your business?
A. Superintendent of printing for the Jewish World.
Q. Did you occupy that position last August?
A. Yes, sir.
Q. Do you know the previous witness and Mr. Schenck?
A. Yes.
Q. That is you know both the previous witness and Mr. Schenck?
A. Yes.
Q. Did you see them last August?
A. Yes, sir.
Q. Will you tell the circumstances under which you saw them.
A. Mr. Lazar came into our office and asked me for a price, I think, on about 15,000 or 16,000 circulars, and I gave him a price, and I think the following day he and Mr. Schenck came into the office and Mr. Schenck gave me the copy for the circular.
Q. Then what did you do?
42 A. I put the circular in type and had it printed.
Q. I show you a printed circular marked, "Edwin J. Carr."

Can you identify that as a circular you printed pursuant to Mr. Schenck's order?

A. Yes, sir.

Q. I show you a similar circular taken out of an envelope addressed to D. Gublebank. Can you identify that as the circular you printed pursuant to Mr. Schenck's order?

A. Yes, sir.

Q. I show you a similar circular taken out of an envelope addressed to John Rule. Can you identify that?

A. Yes, sir.

Q. A similar circular taken out of an envelope addressed to Louis M. Passavello. Can you identify that?

Mr. Nelson: I object to the question in that form. A similar circular. A similar circular might not be the circular printed by the witness.

By Mr. Walnut:

Q. I show you a printed circular taken out of an envelope addressed to Harry J. Kohler. Can you identify that circular?

A. Yes.

Mr. Nelson: Identify it as what, please.

Mr. Walnut: As a circular printed pursuant to the order of Mr. Schenck.

Mr. Nelson: By whom?

Mr. Walnut: By the Jewish World. I will repeat the entire question every time.

43 Mr. Nelson: No, don't do that. I only *what* to know that the witness understands.

By Mr. Walnut:

Q. I show you a bundle of printed circulars. Can you identify those circulars as circulars printed by you pursuant to an order given you by Mr. Schenck?

A. Yes, sir.

Q. Can you say the same about this package?

A. Yes, sir.

Q. And this package?

A. Yes, sir.

(The packages referred to are marked, "Government's Exhibits 2, 2-a, 2-b," *respectfully,* having been heretofore offered in evidence).

Q. I show you a printed circular contained in an envelope addressed to Samuel Snyder. Can you identify that as the circular printed by you, pursuant to Mr. Schenck's order?

A. Yes.

Mr. Walnut: I would like to offer in evidence, without taking the leaflet out of each one of the envelopes, the leaflets contained in these envelopes addressed to various people.

Mr. Nelson: All these are admitted by the defendants, that is in regard to the testimony of this witness. He has testified, as I understand, that one of these letters contain- a circular similar to the one he printed. Is that right?

44 The Witness: Yes.

Mr. Nelson: The witness has identified a circular from one of these envelopes as a circular printed in his office, and it is agreed that his testimony on all the rest of these envelopes will be the same.

Mr. Walnut: Then, the government offers in evidence circulars contained in a number of envelopes.

The envelopes containing circulars as offered in evidence are identified in bulk as "government's Exhibit No. 4, 12-19-17, W. E. M."

Cross-examination.

By Mr. Nelson:

Q. You testified in this case before Commissioner Long, did you not, on September 5th?

A. I don't know the exact date, but I did testify before commissioner Long.

Q. Well, about that time, in this room?

A. Yes, sir.

Q. And you were asked this question. I will read the question from page 2. The question refers to Mr. Schenck. "Where did you see him? A. At the address of the Jewish World. Q. What is that address again? A. 233 South 5th Street. Q. What was your conversation with Mr. Schenck and what did he come there for? Objected to and overruled. Q. What was the date? A. I couldn't tell you exactly. Q. What month? A. He came and gave

45 me copy of the Peoples Press in July and August. Q. Both of this year? A. Yes."

And, further down on the same page, "Q. What did he say? You said that Mr. Schenck spoke to you the first time he came to see you? A. I don't know. Yes, I can say it was in reference to printing or copying some work. Q. What was the first time he came to the office? A. The first time he came to the office he came in reference to the Peoples Press, a weekly publication."

Are those questions and answers correct, to the best recollection? Is that what you said at that time?

A. Well, as nearly as I can remember, they are substantially correct.

Q. Then Mr. Schenck came down to the office on several occasions about various bits of printing, is that true?

A. Yes.

Q. At that time were you printing a weekly paper for the Socialist Party, called the Peoples Press?

A. At which time?

Q. Around about that time, whenever it was in August?

A. Yes, sir.

Q. Every week you got out this little paper called the Peoples Press?

A. Each week, yes, sir.

Q. And you said in direct examination that this circular, which you said was printed in your office, was printed for the
46 Peoples Press?

A. I don't know that I said just that. I may have said that.

Q. Now you have positively identified these circulars as circulars printed in your office?

A. Yes, so far as a man can be humanly sure of anything, I am sure of it.

Q. But you couldn't be absolutely positive about it, could you? For instance, this particular circular might have been printed in another shop with similar type, might it not?

A. It might have been.

Q. And on the same kind of paper?

A. It might have been.

Q. And one of the ways, I understand, that you identify this as your work, is due to the fact that there is a Union label at the bottom with the number 25 opposite it.

A. Well, that is part of my identification, yes, sir.

Q. That label has been counterfeited before to your knowledge, hasn't it?

A. Oh yes, that is possible.

Q. And all Union labels in the printing trade are the same except for the fact that they have a different number opposite the label?

A. Yes, sir.

Q. So that somebody might make up a paper exactly like that, might they not, somebody who was not connected with the Jewish World?

47 A. Well, it would be rather unusual to find the same combination of type, borders, and rulings, but still it is possible.

Q. It might be a photographic process or something of that sort to get out a circular of that sort to exactly imitate it, might it not?

A. That is possible.

Q. Now, in the printing craft, there are various ways of reproducing papers so that they look exactly alike?

A. Yes, sir.

Redirect examination.

By Mr. Walnut:

Q. You have compared one of these leaflets which have been taken from the envelopes with one of the leaflets in these piles?

A. Yes.

Q. Is it your conclusion that they were made at the same time from the same press.

A. Yes, sir.

FRANK L. GARBARINO, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. You are the special agent for the Bureau of Justice?
A. Bureau of Investigation, Department of Justice.
Q. Did you go to 1326 Arch Street on August 28th?
A. Yes, sir.
Q. With Mr. Wynne?
48 A. With Mr. Wynne, Chief Cortelyou, Mr. Abrams of my office and Mr. McDevit and Deputy Marshall Kenny.
Q. Will you state what you did when you went to this place?
A. Mr. Kenney had a search warrant and also a warrant for the arrest of Mr. Schenck. We found a young lady in the office in charge who gave the name of Abramowitz. She stated Mr. Schenck would be in in a few minutes.

Mr. Nelson: I object to anything the young lady said.

The Witness: Mr. Schenck was not there. He came in a few minutes after that. He was then told of the search warrant and of another warrant for his arrest.

By Mr. Walnut:

Q. Did you tell him?
A. No, sir . The Deputy Marshall told him. I just asked Mr. Schenck, or I told him that anything he might say to us might be used against him, that we were there to make a search for certain articles and that he could help us by telling us where these records were and he said he didn't care to talk to me and to let him talk to his attorney first and he asked permission to call up his attorney and he called up Mr. Nelson, and after he hung up the receiver he said that Mr. Nelson told him he should say nothing to me or any of us. We then continued our search and at times we would ask him what certain things were, for instance, the circulars which were found on a table in the front office, and I asked him as to where they
49 came from and who printed them. I found in the pigeon holes of a desk some newspaper clippings with the names of—

Mr. Nelson: I object to testifying as to what the newspaper clippings were on the ground that it might incriminate the defendants.

Objection sustained.

By the Court:

Q. Can you identify the newspaper clippings?
A. Yes.

The Court: He may do that.

By Mr. Walnut:

Q. Are these the newspaper clippings (witness shown newspaper

clippings heretofore offered in evidence as "Government's Exhibit No. 1.)

Mr. Nelson: I didn't know there were so many of these clippings. If you will identify one, we will agree to all the rest.

The Witness: Yes, these are the clippings.

By Mr. Walnut:

Q. What did Mr. Schenck say about these circulars?

Mr. Nelson: I object to anything that Mr. Schenck said.

By Mr. Nelson:

Q. I believe you have already testified you warned him?
A. Yes, sir.
Q. Just what words did you use when you warned him?
50 A. I told him that anything he might say could be used against him, that we had a warrant for his arrest, and Mr. Kenney had already served it at that time, and he said he wouldn't talk until he went to the phone and called up his attorney and after leaving the phone he came back and said that his attorney said not to say anything to any of us.
Q. Was Clara Abramowitz there at the time?
A. I think maybe she called you up.
Q. No, who was present when you said, "I warn you that anything you may say may be used against you. There is a warrant for you."
A. Oh, two or three of us were there. Two or three of those young men and the officers were there, I believe, Mr. Wynne, and Mr. Cortelyou were in the front room and I was in the back office.
Q. And they were there when you warned Mr. Schenck?
A. They were in the office, yes.

By Mr. Walnut:

Q. Well, can you state what Mr. Schenck said about the circulars.
A. I asked him if there were any more circulars than were in those bundles that were on the tables and some on the floor and he said, "No, I believe they are all there." I asked him where they were printed and he said, at the Jewish World and then something else came up and I was making a search in another part of the room and I found a minute book and I asked him what minute
51 book it was and he stated it was the minute book of the committee, I believe, and I think I asked him if there was a minute book of the Socialist Party there and he said that there was and it was up on a shelf.
Q. Did he say anything more about the circulars in your presence?
A. No, sir. I asked him to whom they were sent and he didn't answer the question.

Cross-examination.

By Mr. Nelson:

Q. Did Mr. Schlick answer every question you asked him?
A. Not in the beginning, sir, no, sir.
Q. And after you had warned him that anything he might say would be used against him?
A. Well, occasionally, when I picked up a book or a paper or a document, I would ask him a question and he would answer.
Q. He answered every one of your questions?
A. Well, I think so, yes.
Q. Well, most of them?
A. Most of them.
Q. And what are those papers and he would tell you?
A. Yes, and I would ask him if there was anything else in the office that was mentioned in the warrant, in the search warrant that we had, and if there was and he would show us where it was, it would help us, if he wanted to do it.
Q. And did he help you?
A. Not very materially.
Q. But he answered every question you put to him about the nature and character of the books and papers?
A. Yes, sir.
Q. Did you get all the papers you wanted?
A. I guess we did.
Q. Now, there were some things that he didn't answer?
A. Yes.
Q. Some questions?
A. Oh yes, there were some questions that he would not answer.
Q. Can you tell us some of the questions that you asked him and he didn't answer?
A. Well, I asked him, I believe, whether he was mailing those circulars and he made the reply that you had told him not to talk and he wasn't going to answer the question and I didn't press the question after that.
Q. Any other questions that you recall asking him which he didn't answer?
A. I don't recall any others of any importance.
Q. Now, of the questions that he did answer, did you afterwards discover that he was lying about it?
A. No, I guess not.
Q. When he did answer a question he answered truthfully?
A. So far as I know.
Q. And otherwise he simply refused to answer?
A. Yes, sir.

58 James T. Gerenlow, having been duly sworn, was examined and testified as follows:

By Mr. Wolcott:

Q. You are connected with the Postoffice Department?
A. Yes.
Q. In what capacity?
A. Postoffice inspector in charge of the Philadelphia Division.
Q. Did you go to 1326 Arch Street on or about the 28th of August this year?
A. I did, yes, sir.
Q. Will you state what you did up there and what happened?
A. I went up there in company with Inspector Wynne of our office and Mr. Garbarino of the Department of Justice and Mr. McDevitt from his office and Deputy Marshall Keaney, for the purpose of taking part in an investigation of the business conducted at that place and for the purpose of assisting in the service of a search warrant and making such other investigation as was necessary. That was brought about as a result of an investigation conducted by the Postoffice Inspection Service of the Department of Justice. When we arrived at the office, we found, in the back room, some eight or ten young men.
Q. How is that place arranged?
A. As I remember, there are two rooms, front and back, the back part of the place being more or less of an office and the front part a sales room. The place was in charge of a young lady there and we inquired for Mr. Schenck and others who were supposed to be connected with it. Mr. Schenck was not in at the time. We
58 questioned the young men in the rear and later Mr. Schenck came in. On his arrival, Mr. Garbarino had a conversation with him. Later, we were in the back room, which was the office. I saw Mr. Schenck go to the telephone after his conversation with Mr. Garbarino, and call to some one at the other end, whom he said was Mr. Nelson, his counsel. On coming back to the rear room we asked him for certain records and received those papers and the minute book and other records which are now in the custody of the government, and at the time those records were passed over, they were all identified and described by Mr. Schenck. A memorandum was made at the time by a stenographer from my office, Mr. Abraham. Mr. Schenck described the minute book and stated that the memorandums in there consisted of the original memorandums made by the secretary?

Mr. Nelson: I object to this witness testifying as to what Mr. Schenck said unless he also states, as Mr. Garbarino did, that he did himself, or that he heard somebody say to Mr. Schenck, that he was warned that anything he said might be used against him.

By the Court:

Q. I understand this was after the conversation Mr. Garbarino testified to?

A. Yes.

Mr. Nelson: Then I would like to ask at this time if I may interrupt, whether or not Mr. Cartelyou heard Mr. Garbarino
55 warn Mr. Schenck that anything he said might be used against him.

The Witness: I did not, but after the conversation with Mr. Schenck and Mr. Garbarino, Mr. Schenck immediately went to the telephone, which was placed on the mantel of the front room and then came back and said he had conculted with Mr. Nelson and he had been advised not to say anything and then we proceeded with the serving of the search warrant.

By Mr. Nelson:

Q. And you were there all the time Mr. Garbarino was there?

A. I was there all the time, but sometimes I was in the front room and sometimes in the back room. I informed Mr. Schenck that I was the Postoffice Inspector in charge at Philadelphia and showed him my commission.

Q. You didn't tell him that anything he said might be used against him?

A. No, I did not.

Q. And you didn't hear Mr. Garbarino notify him in your presence that anything he said might be used against him?

A. No, I didn't hear it.

Q. But you were going back and forth from one room to the other?

A. Yes.

By Mr. Walnut:

Q. Did Mr. Schenck say anything about the circulars?

A. Yes, he said that they had been printed in the Jewish
56 World and he said he thought they had in the neighborhood of about 16,000 printed. He was also questioned as to this circular and as to a circular previously sent out which was known as the one side of the circular and he said that this lot here was made up of the one sided circular with the additional back printed thereon. He was asked as to his mailing letters or as to how he secured the names of people whom these were to be sent to and he said, "In different ways, people came in," and he said, they secured names in any way that they could. While we were making a memorandum of the things that were to be taken to the Postoffice, Mr. Garbarino found these clippings in one of the pigeon holes on, I think, the lefthand side of the room as you come in. The minutes there were all identified by Mr. Schenck, including the original notes which Mr. Schenck stated were taken at the time of the meetings and later typewritten and then later put in the books, but the original notes were there in addition to the typewritten copies.

Q. Did you show Mr. Schenck the newspaper clippings?

A. Mr. Schenck saw the newspaper clippings brought from that side of the room. I saw them taken from the pigeon hole by Mr.

Garbarino and they were immediately brought over to where we were standing.

Q. Did he say anything about them?

A. His attention was called to the way in which they were marked at that time.

57 Q. Did he say anything about them?

A. No, sir.

Cross-examination.

By Mr. Nelson:

Q. The circulars you speak about, were they lying loose on the table? I mean were some of those circulars lying loose on the table as you go into the store?

A. I think they were mostly in the back room.

Q. Mostly in the back room tied up in bundles?

A. Some were tied up and some were not tied up. They were in two or three different places. There was one pile on the table and another pile on the floor.

Q. Were there some on the table in the front room?

A. I don't remember that there was.

Q. You couldn't testify that there were not any on that table?

A. No, I wouldn't say that. They may have been there.

Q. Was there any effort at secrecy in the disposition of the circulars or were they lying open where anybody could see them?

A. Oh, you could see them. One of these piles was on the main table in the back room.

Q. Anybody that would walk into the room might see these circulars lying open on the table and not tied up in bundles?

A. Laying open in the rear room on the table, which was the office. I don't remember seeing any in the front room.

Q. Is that headquarters and store still open at 1326 Arch Street?

58 A. I don't know.

Q. Have you been there or near there since the raid?

A. I have not, no sir.

Q. Is the headquarters closed up as the result of the raid?

A. I don't know.

Q. When you left there with the things you wanted, it was still open, wasn't it, and people in attendance?

A. No. I believe they closed it up. Now, there was some controversy there between Mr. Schenck and Mr. Lazar as to who would remain in charge. I believe they finally waited until Mr. Lazar came back and left him in charge. All the other people had left.

Q. You had no orders to lock up the place, however, and put a seal on it?

A. We did not and we didn't do that either.

Q. You simply had this warrant to get certain books and papers and other things in those headquarters?

A. The Deputy Marshall did that.

Q. Did you get everything that you went after?
A. Well, we took everything that we thought was necessary.
Q. Did you take everything that was named in the warrant?
A. Yes, sir.

CLARA ABRAMOWITZ, having been duly sworn, was examined and testified as follows:

Mr. Gibbons: Before this witness is asked any questions, I want to say that she was arrested at the time of the raid although
59 she was not indicted, and I represent her, and it is perfectly possible that she may be asked some questions that might result in her indictment and, therefore, I think she ought to be warned that anything she says might be used against her.

The Court: You may warn her.

Mr. Gibbons: Before you answer any questions, I want to tell you that anything you may answer here, which you think may incriminate you and lay you open to being indicted, you are privileged to refuse to answer. Do you understand that?

The Witness: Yes, sir.

By Mr. Walnut:

Q. Where are you employed?
A. Socialist Party Book Store.
Q Where is that located?
A. 1326 Arch Street.
Q. How long have you been there?
A. I am there about ten months, nine or ten months. I can't swear to it.
Q. Do you know Mr. Charles Sehl?
A. Yes, sir.
Q. And have you seen him there often?
A. Yes, once in a while.
Q. Where have you seen him?
A. I seen him in the store, sometimes on the street.
Q. What do you mean by the store?
60 A. The book store where I am employed.
Q. That is at 1326 Arch Street?
A. Yes, sir.
Q. And what would he do when he came to the store?
A. He would buy books sometimes and sometimes ask for different people, Mr. Schenck and so on like that.
Q. You frequently saw him in the office with Mr. Schenck, didn't you?
A. Well, I saw him, but I don't know as to Mr. Sch[illegible] all the time. I am busy in the store and I would see him come [illegible], but I couldn't say he came often to see Mr. Schenck or not, but he spoke to him occasionally.
Q. Do you know whether Mr. Sehl is a member of the executive committee of the Socialist Party?
A. I believe he is, yes, sir.

Q. You took charge of the records of the Socialist Party?
A. In the book store.
Q. Did you ever send out notice for meetings of the executive committee?
A. I don't recall, no, sir.
Q. Do you know Mr. Jacobs H. Root?
A. Yes, sir.
Q. Is Mr. Sehl here in court?
A. Yes, he is there in back of the lawyer.
Q. Is Mr. Root here?
A. Alongside of him.
Q. And Mr. Higgins?
61 A. He is back of Mr. Cortelyou.
Q. You have seen all three of these men at the Socialist Party headquarters?
A. Yes, sir.
Q. And how about Mr. Root and Mr. Higgins, are they members of the executive committee also?
A. I believe they are, yes, sir.
Q. What is your connection with the executive committee?
A. Not that I know of, no connection whatever.
Q. Did you ever see circulars or leaflets such as these (circulars introduced in evidence shown witness) at 1326 Arch Street?
A. Yes, sir.
Q. Last August?
A. I seen them last summer, yes.
Q. Do you know what was done with these leaflets and circulars?
A. No, sir, I couldn't swear to it.
Q. Do you know what was done with any of them?
A. Well, they could be gotten when people asked for them and I sent them in the other room to get them. They were there open to the public and there was no restriction on them. Any one could get them.
Q. Did people come in and ask for them?
A. Yes, quite a good many.
Q. Then you would send them into the other room to get them?
A. To get them, yes, sir. Sometimes I would get them for
62 them.
Q. You used to give stamped envelopes away with these circulars?
A. If they would ask for them.
Q. You had stamped envelopes there to give?
A. Well, envelopes were there, and if they were asked for, I would give them to them.
Q. And who told you to give the stamped envelope with the circular if they were asked for?
A. Why, the circulars were there and I believe Mr. Schenck told me to give them to any one who called for them, give them out at any time.
Q. Was Mr. Schenck your immediate superior?
A. Yes, sir.

Q. You took orders from him?
A. Yes.
Q. Do you know whether Mr. Sehl was present at a meeting of the executive committee last August, August 13th?
A. No, sir, I couldn't swear.
Q. Do you know when the executive committee met?
A. Yes, sir, I know that they met Monday night. I believe they used to meet Monday nights.
Q. Were you ever at the headquarters when the executive committee met?
A. Once, I can recall.
Q. Do you remember when that was?
A No, sir, I don't remember the date.
Q. You said that you thought Mr. Sehl and Mr. Root and
63 Mr. Higgins were members of the executive committee?
A. Yes, sir.
Q. Now, why do you say that?
A. Well, I heard from people who are members of the parry and I know from the minutes of the meetings. I know that Mr. Root, Mr. Higgins and Mr. Sehl were members of the executive committee because of the members talking about it and I also know from the minutes.
Q. Did you write the minutes, I mean typewrite them?
A. Some of them.
Q. Can you tell the minutes of which meetings you wrote?
A. Perhaps we could.
Q. Before you you have some newspaper clippings. Would you say that you have seen these clippings before, or similar clippings?
A. Yes, sir.
Q. You have heard it testified here that those newspaper clippings were found in the pigeon hole of Mr. Schenck's desk. Did you ever make use of newspaper clippings containing a list of men who had been accepted by local exemption boards that had any connection with the circulars that were given out?

Mr. Nelson: I object to that question if the question refers to these particular newspaper clippings, on the ground that these clippings were taken away from the defendant and are now being used as evidence against him, and possibly might incriminate him. I might add, if the question simply refers as to whether or not
64 this Miss Abramowitz made use of some newspaper clippings for some purpose, I see no objection to that. I do object to these particular clippings.

Objection overruled. Exception noted for the defendants by direction of the court.

The Court: Of course, the evidence does not amount to anything unless it is shown by whose direction she did it.
Mr. Walnut: I think the witness has already testified that these circulars and letters were issued at the direction of Mr. Schenck.

The Court: You are talking about the newspaper clippings and you are asking what use was made of them.

By Mr. Walnut:

Q. Did you ever give newspaper clippings containing a list of names of men who had been accepted by local exemption boards for military service to persons to whom you gave copies of this leaflet and stamped envelope?
A. No, sir.
Q. Did you ever see anybody else give out clippings of that sort?
A. No, sir.
Q. Did you ever make use of these clippings in order to secure a list of names of persons getting these leaflets?
A. No, sir.
Q. Do you know what these clippings were used for?
A. No, sir.

65 Q. Did you ever cut clippings out of the newspaper similar to those, at the direction of Mr. Schenck?
A. No, sir.

Cross-examination.

By Mr. Nelson:

Q. You are employed by Mr. Schenck to help him wait on the Socialist Book Store at 1326 Arch Street. Isn't that correct?
A. Yes, sir.
Q. Are you or are you not?
A. Yes, I am.
Q. Then, in the course of that work, did you sell books?
A. Yes, sir.
Q. Did you also sell other things up there?
A. Yes, sir.
Q. Did you sell badges?
A. Yes, sir.
Q. Did you sell stamps?
A. Yes, sir.
Q. And envelopes?
A. Yes, sir.
Q. Pamphlets?
A. Yes, sir.
Q. Leaflets?
A. Yes, sir.
Q. And there is other literature up there that is given away. Isn't that true?
A. Yes, sir.

66 Q. These leaflets are propaganda for the Socialist Party that are given away?
A. Yes, sir.
Q. And sometimes you have bundles of them laying on the table for anybody to pick up that comes in?

A. Yes, sir.

Q. Not only that, but there is a shelf outside of the window of that store and people can come along at certain times and take circulars?

A. Yes, sir.

Q. And sometimes you have some for sale out there with a box where anybodt that wants to can take a certain paper and drop a penny or two pennies or five pennies in the box?

A. Yes, sir.

Q. Now, you are employed by the Socialist Party through Mr. Schenck?

A. Yes, sir.

Q. Mr. Schenck is the secretary. Is that right?

A. Yes, sir.

Q. So far as you know, Mr. Schenck is not a member of the executive committee, is he?

A. No.

Q. And you don't know of your own knowledge who are the members of the executive committee? You only know from what you hear?

A. Yes, sir.

Q. You don't attend the meetings of the executive committee?

67 A. No, sir.

Q. You work during the day from 8 or 9 in the morning until 5 or 6 at night and sometimes a little later?

A. Yes, sir.

Q. And, so far as you know, the executive committee meets on Monday night?

A. Yes, sir.

Q. Unless there should happen to be some extra meeting during the day?

A. Yes, sir.

Q. Now, there are other people that come in and out of that store besides Mr. Schenck, Mr. Sehl, Mr. Higgins and Miss Baer?

A. Yes, sir.

Q. You have seen me walk into that store on several occasions, haven't you?

A. Yes, sir.

Q. And you have seen Miss MacMurtrie come into that store?

A. Yes, sir.

Q. And various people come to that store as the headquarters?

A. Yes, sir.

Q. People come into that store who are not Socialists and are not connected with the Socialist Party because there they can get certain radical books that are not usually kept in stock by other book stores?

A. Yes, sir.

Q. And you keep sets of books there by well known authors

68 like Balzac?

A. Yes, sir.

Q. And other writers?

A. Yes, sir.

Q. You recall that there were circulars similar to those in the bundle on the table in the Socialist Book store, don't you?

A. Yes, sir.

Q. And you recall that some circulars similar to those in these bundles were lying loose on a table in the front room so that anybody who came in there might pick them up and take them? You recall that, don't you?

A. Yes.

Q. There was no attempt to hide these circulars?

A. Oh, no, sir, they were lying all over.

Q. They were there lying loose on a small table on the front table where people might have them for the taking or else they were tied up with string in these bundles and were on the table in the back room?

A. Yes, sir. I would very often shove them off from the front table because they would make the place look untidy, and that would be the only reason I would shove them in the back room.

Q. Well, that was the reason why they were tied up in bundles and put on the back table, that they were liable to clutter up the front store?

A. Yes, I believe so, yes, sir.

Q. And when somebody would come in there and ask you for an envelope and stamp and pay you for it and get a circular,
69 you wouldn't know what that somebody was going to do with the circular?

A. No, sir.

Q. Did anybody ever come to you and say, "Give me a stamp and an envelope and a circular, I want to send it out to somebody by mail?"

A. No, sir.

Q. And, so far as you know of your own knowledge, circulars similar to those on the table were not sent out by mail?

A. No, sir.

Q. Through you or anybody else that you know of of your own knowledge?

A. No, sir.

Q. Now, these were not the only circulars that were issued by the Socialist Party, were they?

A. No, sir.

Q. Isn't this one of the series of similar circulars?

A. Yes, sir.

Q. Weren't there other circulars of a similar nature, issued by the Socialist Party?

A. Yes, I believe there were, not the exact nature, but they were referendums or other circulars, mostly every week, or every other week, we had some referendums of some sort to be sent out.

70 EDWIN J. CARR, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Where are you engaged now?

A. At the present time I am at Camp Meade, Maryland, in the Headquarters' Troop of the National Army, 79th Division.

Q. When did you go down there?

A. I think it was on Sunday, November 4th, of this year.

Q. That you were called for mobilization?

A. That is the day we left Germantown to go to Camp Meade. I received what is known as the pink slip on the previous Thursday, which I think was November 1st.

Q. So you went down there pursuant to the terms of the Selective service act?

A. Yes, as passed by Congress this year.

Q. Did you receive a leaflet, a printed circular, like this printed circular? (Paper shown witness.)

A. No, sir, I didn't receive that circular.

Q. Did you ever see that circular before?

A. Yes, sir. In response to a summons from the court, I came here, I believe it was the latter part of August, or the first part of September. I identified this circular and put my name and address on the envelope.

Q. That is your name and address on the envelope?

A. That is my name and address.

71 Mr. Walnut: I offer in evidence the circular and envelope containing the same, the envelope addressed to E. J. Carr, 459 Cosgrove Street.

Mr. Nelson: I object to the offer unless it is shown that it was sent by one of the defendants.

Mr. Walnut: If the court please, I don't consider that is necessary, in view of the charge we have here against the defendants, to show that it was actually sent by them.

The Court: Does it show that it has been in the mail?

Mr. Walnut: Yes, sir.

The Court: The post mark is on it?

Mr. Walnut: Yes, sir.

Objection overruled. Exception noted for the defendants by direction of the court.

Mr. Walnut: I offer in evidence the envelope containing the circular, addressed to 459 Cosgrove Street, Germantown, and postmarked Philadelphia, Pa., Passyunk Station, August 20, 4.30 P. M., 1917.

The paper offer- in evidence by the government is marked, "Government Exhibit No. 5, 12-19-17, W. E. M."

Cross-examination.

By Mr. Nelson:

Q. The receipt of that circular by you through the mail did not cause you to become insubordinate to the orders of the United States government?

A. I did not receive this circular but, if I had received that,
72 I should say that was the intention and would have caused me to do so.

Q. I didn't ask you that, Mr. Carr. The circular you did receive, which you say is similar to the one shown you——

A. I said that I didn't receive the circular.

Q. When you came here you were given an envelope addressed to you. Is that right?

A. That is correct.

Q. Then you opened it up and found this circular in it?

A. That is correct.

Q. And you read the circular?

A. No, I didn't read it.

Q. Then you don't know anything about it?

A. I do not. I know that I put my name and address on it and the fact that I have found on me that this was seen by me the 9th month, 15th, 1917, and my name.

LOUIS M. PASSARELLO, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. How old are you?

A. 25 last October 17th.

Q. Did you register?

A. Yes, sir.

Q. When were you called by the Local Board for examination?

A. On August 8th, I believe.

Q. Did your name appear in the newspaper among those
73 who had been accepted for service?

A. Yes, it appeared in the Bulletin but my name*d* was spelled wrong, they had it Passavello instead of Passarello.

Q. What is your employment now?

A. Clerk in the United States Engineering Office in the Witherspoon Office, this city.

Q. I show you what purports to be a newspaper clipping. Can you find your name on there?

A. Yes, here it is here.

Q. How is it spelled on there?

A. Passavello.

Q. That is the way it is spelled in the newspaper?

A. Yes, sir.

Mr. Walnut: This is a newspaper clipping taken from those already offered in evidence, containing a list of names from the 41st

district passed, a list rejected, 42nd district passed and rejected and 43rd district passed.

Mr. Nelson: I don't want to be constantly objecting, your Honor, to take up the time, but cannot I have it noted on the record that I object every time testimony of this kind is offered without objecting in each specific instance?

The Court: The testimony in regard to papers taken on the search warrant?

Mr. Nelson: Yes, sir.

The Court: You may have a general objection and exception.

74 By Mr. Walnut:

Q. I now show you envelope and ask you is that your address?

A. Yes, sir.

Q. This envelope which I now hand you has your name and address?

A. It has my name but it is spelled wrong.

Mr. Walnut: This envelope which I now hand you is addressed to Mr. Louis M. Passavello, 1817 South 54th Street, postmarked Philadelphia, August 26th, 8 P. M., 1917, Southwark Station.

Q. Did you receive this letter?

A. Yes, sir.

Q. What was in it?

A. A circular, I don't know whether it was from the Socialist Book Store or something on Arch Street or not.

Q. Was this the circular or a circular similar to this (circular shown witness)?

A. Yes, sir.

Q. What did you do with it?

A. Why, I put it in my pocket intending to send it to the postal inspector the next morning, but we were so busy in the morning that I didn't have an opportunity to do it and three or four days after that I wrote a letter to the chief postal inspector enclosing this letter and stating that I didn't think such literature should be sent through the mail.

Cross-examination.

By Mr. Nelson:

Q. What was that last answer you gave?

75 A. I said that I didn't think that such literature as that should be permitted to be sent through the United States mail.

Q. Did you read the circular?

A. Yes, sir.

Q. Completely?

A. Yes, sir.

Q. All the way through?

A. Yes, sir.

Q. Did the reading of the circular cause you to act in an insubordinate way towards your government?
A. No, sir.
Q. Did it make you act, if anything, more scrupulously, complying with the requirements of this government?
A. I don't quite get your question.
Q. Did it make you act all the more scrupulously exact towards your government?

Mr. Nelson: Perhaps that is not clear. I will withdraw the question.

By Mr. Nelson:

Q. Did the receipt of this circular cause you to be especially careful to act fully up to all the duties you owed your government?
A. Yes, sir.

Mr. Walnut: If the court please, I would like now to read this circular.

The Court: You may read the circular.

76 Mr. Nelson: It is understood that my objection covers this also.

The Court: Yes.

Mr. Walnut: This is the circular which was taken from the envelope identified by Mr. Passarello and on one side it is headed, "Long live the constitution of the United States" and on the other side it is headed, "Assert your rights."

(Mr. Walnut here read the printed circular.)

JOHN RULE, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Were you registered under the act of May 18, 1917?
A. Yes, sir.
Q. Did you appear before your local board for examination?
A. Yes, sir.
Q. And were you accepted?
A. Yes, sir.
Q. Did your name appear in the newspaper among those who were accepted?
A. Yes, sir.
Q. I show you an envelope. Is that your address?
A. Yes, sir.
Q. Did you ever receive that letter?
A. I did.
Q. What was in the letter?
A. A folder similar to this.

77 Q. What did you do with it?
A. I read it and took it to the office with me the following

morning and sent a message boy over to Chief Carlstyon with it, with a memorandum.

Mr. Watson: I wish to offer this in evidence also.

Paper offered in evidence is marked "Government's Exhibit No. 4, 10/16/17. W. H. H."

Q. What is your business?
A. I am manager of the Stock Department of a wholesale hardware store.

Cross-examination.

By Mr. Nelson:

Q. You read the circular that was in that envelope?
A. I did.
Q. You read it all the way through?
A. I think so.
Q. What is similar, so far as you can tell, or exactly the same, as the one you just read here?
A. The one read by Mr. Watson, yes.
Q. And, as a result of reading that circular, did it cause you to become particularly excited for United States?
A. It did not.
Q. Did it cause you to try to evade the draft or refuse to register or to do anything of a disloyal nature to the country?
A. No, sir; it did not.
Q. On the other hand, did it have the opposite effect on you, did it cause you to feel as if you must go out of your way, as it were, to refer to be strictly loyal and subordinate to your duly elected government?
A. It caused me to go out of my way to bring the people that sent it around to the attention of the proper authorities.
Q. And you immediately notified the authorities about it?
A. Yes.

ROBERT GOODMAN, having been duly sworn, was examined and testified as follows:

By Mr. Watson:

Q. Where are you located?
A. Camp Meade, Maryland.
Q. What did you go there for?
A. [illegible] 1918.
Q. Were you called under the selective service act?
A. Yes, sir.
Q. I show you a letter addressed to Robert Goodman, 1000 Chestnut Avenue. Is that your address?
A. Yes.

Q. Will you open that letter?

(Witness opens letter.)

Q. Mr. Wallace: The circular contained in the envelope is headed on one side, "Long live the constitution of the United States," and on the other side, "Assert your rights."

I offer in evidence the envelope and the circular contained in it.

70 Paper offered in evidence is marked "Government's Exhibit No. 7, 12-19-17, W. E. W."

Cross-examination.

By Mr. Nolan:

Q. Did you read this circular, Mr. Anderson?
A. No, sir, just received it.
Q. So that you didn't know what the contents of the circular was?
A. No, sir.
Q. You didn't know anything except what you have heard in connection with this case?
A. That is all.

Horace F. Bacon, having been duly sworn, was examined and testified as follows:

By Mr. Wallace:

Q. Were you drafted?
A. Yes, sir.
Q. When did you go to Camp Meade?
A. October 26th.
Q. From what local board?
A. 32.
Q. Is this your name and address (envelope handed witness)?
A. Yes.
Q. What is it?
A. 7022 Winfield Avenue. That is where I was working at that time.

80 Q. That is where you were working when?
A. When I was drafted.
Q. How long have you been living there?
A. I lived there in June.
Q. You were living there at the time you were called for examination?
A. Yes, sir.
Q. Will you open that letter?

(Witness opens envelope.)

Mr. Wallace: The circular taken from the envelope is entitled on one side, "Long live the constitution of the United States," and, on the other side, "Assert your rights."

Q. You have never seen this circular before, have you?
A. No, sir.

Mr. Walnut: I offer in evidence this circular and the envelope containing the same.

Paper offered in evidence is marked "Government's Exhibit No. 8, 12-19-17, W. E. M."

Cross-examination.

By Mr. Nelson:

Q. Your name is Banks, isn't it?
A. Yes, sir.
Q. And this envelope with this paper in it, you have just opened up and it is dated, by the postmark, Philadelphia, Passyunk Station, August 28th, 4.30 P. M., 1917.
A. Yes, sir.
81 Q. You never saw this letter before?
A. No, sir, never saw it before.
Q. It wasn't delivered to you at your address, 5122 Winfield Street?
A. Yes, that is where I was living but I never seen it.
Q. Were you at that address along about August 28th?
A. Yes, sir.
Q. You are sure you opened it up just now, are you, yourself?
A. Yes, sir.
Q. Will you look at that letter from the outside now and tell me if you could tell what was inside of it just by looking at it from the outside?
A. I don't believe I could.
Q. It doesn't show through the envelope, does it?
A. No, I couldn't see.
Q. You couldn't tell what was in there?
A. No, sir.
Q. And yet the United States Attorney comes and hands you a letter that you couldn't tell what was inside of it and you open it up and here you find a circular which you never read?
A. Yes, sir.
Q. And that circular looks like none of these other circulars you see around here?
A. Yes, sir.
Q. Did you ever read this circular that you have heard us talking about?
A. No, sir.
82 Q. See any any place else but here?
A. No, sir.
Q. So you don't know anything about it?
A. No, sir.

HARRY J. KOHLER, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Is that your residence, 4911 Florence Avenue?
A. It was at the time I received it.
Q. You received this letter?
A. Yes, sir.
Q. And what was in it?
A. This (producing circular).
Q. That circular?
A. Yes.
Q. What did you do with it?
A. I read it over several times and then I went and had a conversation with an attorney and I brought it to Mr. Kane and Mr. Kane turned me over to this gentleman right here (indicating Mr. Wynne).
Q. You were called under the draft law, were you?
A. Yes, sir, 49th district.
Q. And were you examined by that board?
A. Yes, sir.
Q. When were you examined?
A. About the third day of the examinations in that district.
83 Q. And that was what month?
A. It was prior to this time.
Q. Very much prior?
A. Not so very much, no.
Q. A week or so?
A. A week or so, yes, sir.
Q. Were you accepted?
A. It was incorrectly stated in the paper that I was accepted. I was not accepted at that time.
Q. Your name appeared in the newspaper as having been examined by the local board?
A. Yes, and being accepted.

No cross examination.

FRANK HENDERSON, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Where were you living in August last?
A. 1800 North Broad Street, I think it was.
Q. What local board were you examined by?
A. 19th and Fitzwater.
Q. At the time you were examined by that local board, where were you living?
A. 16th Street, 1700 North 16th Street.

Q. I show you a letter and ask you if that is your address on the envelope?

A. That is my address, yes, sir.

84 Q. When was that your address?

A. Well that is one of my homes too, down there and up here too.

Q. Were you registered from that address?

A. From this address I was registered.

By Mr. Nelson:

Q. That is the address you registered from?

A. Yes, sir.

By Mr. Walnut:

Q. The address given on the letter is what?

A. 1612 Kater Street.

Q. Will you open that letter?

(Witness opens envelope.)

By Mr. Nelson:

Q. Before you open it, will you please tell the court whether or not, so far as you know, this has been opened before. Has this envelope been opened before so far as you can tell?

A. Not that I can see.

By Mr. Walnut:

Q. Well, what do you find in it?

(Paper handed to Mr. Walnut.)

Mr. Walnut: He has delivered to me the contents of the envelope being a circular headed on one side, "Long live the constitution of the United States," and on the other side, "Assert your rights."

I offer in evidence the circular and envelope.

85 Paper offered in evidence is marked "Government Exhibit No. 9, 12-19-17, W. E. M."

Cross-examination.

By Mr. Nelson:

Q. It just seems like magic, Mr. Henderson, to find these circulars, but please tell me were you living at this address, 1612 Kater Street about the end of August?

A. Yes, sir.

Q. And this envelope is marked August 28th, 1917. That is the way it is marked here on the envelope, August 28th, 1917. Isn't that right? Just look at it, isn't it marked August 28th, 1917 right here on the postmark. Isn't that August 28th, 1917? Isn't that a fact?

A. Yes, sir.

Q. And you never saw this before this minute?
A. No, sir.
Q. Will you take a look at this envelope and see if you can see through that envelope and be able to tell what is inside of it if you don't open it.
A. I could not.
Q. Well, do you know of any way by which the District Attorney knew what was in this envelope and could come to you to get you to open it and you find this circular in it? Did he speak to you before about it?
A. No, sir.
Q. Never mentioned this particular envelope or you didn't know there was such an envelope in existence?
86 A. No, sir.
Q. And it wasn't delivered to you and you open it up for the first time, you are sure of that?
A. The first time.
Q. And you can't tell in any way how that was done, so the District Attorney would *how* what was going to come out of that envelope?
A. No, sir.

Court adjourned to 10 o'clock A. M., Thursday, December 20, 1917.

87

Fourth Day.

UNITED STATES

vs.

CHARLES T. SCHENCK et al.

Philadelphia, Pa.,

Thursday, December 20, 1917.

Present: Parties as before noted.

HOWARD L. BILL, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Is that your name and address? (Witness shown envelope addressed Howard L. Bill, 1220 Herbert and Postmarked Philadelphia, Pa., August 28, 1917, 7.30 P. M.)
A. Yes.
Q. Will you open that letter?

(Witness opens envelope and takes out printed leaflet entitled on one side "Long live the Constitution of the United States" and on the other side, "Assert your Rights." Leaflet identified by initials of witness.)

Q. Did you register?
A. Yes.
Q. Were you examined by your Local Exemption Board?
A. Yes, sir.
Q. What number Board was it?
A. 15th Local Board.
Q. Were you accepted?
88 A. Yes, sir.
Q. When were you examined, what month?
A. I can't exactly be sure, but I think it was on August 6th.
Q. Did you- name appear in the newspapers?
A. I believe it did.
Q. You didn't see it?
A. Not myself, but I was told by friends that it did.

Cross-examination.

By Mr. Nelson:

Q. Did you ever see that envelope before that was just now handed to you?
A. No, sir, I did not.
Q. What is the date of the post mark on the envelope?
A. I didn't notice that.
Q. And it was sealed and closed when it was handed to you?
A. Yes, sir.
Q. You didn't speak about the envelope 21 before?
A. No, sir, I didn't know anything about it.
Q. Do you know who sent it to you?
A. No, sir.
Q. Did you ever see that sort of a circular before?
A. Not that I can recall.

Mr. Walnut: I offer in evidence the leaflet and envelope identified by the witness.

Leaflet and envelope offered in evidence are marked "Government's Exhibit No. 10, 12-20-17, W. E. M."

89 LEONARD ALLEN, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. Is that your name and address? (Witness handed envelope addressed to Leonard Allen, 3431 North American Street, City, postmarked Philadelphia, August 28th, 4.30 P. M., 1917, Passyunk Station).
A. Yes, sir.
Q. Will you open that letter?

(Witness opens envelope and take from envelope printed leaflet headed on one side, "Long live the Constitution of the United States,"

and, on the other side, "Assert your Rights," which he marked with his initials.

Leaflet and envelope are offered in evidence and marked "Government's Exhibit No. 11, 12-20-17, W. E. M."

Q. Did you register last June?
A. Yes.
Q. Were you examined by your Local Exemption Board?
A. Yes, sir.
Q. When were you examined?
A. Some time in June, I believe.
Q. In June?
A. I am not sure of that date, as to when I was examined.
Q. Do you remember what month?
A. June or July, something like that. I wouldn't be sure of it.

90 Q. Did you see your name in the paper among those accepted?
A. Yes, sir.
Q. You were accepted?
A. Yes, sir.
Q. I assume you are now at Camp Meade?
A. Yes, sir.

Cross-examination.

By Mr. Nelson:

Q. Did you hear that circular read yesterday?
A. Yes, sir.
Q. Would the receipt of such a letter by you, that is if that letter had been delivered to you on August 28th, would the receipt of that circular and the reading of it have caused you to become disloyal to the government?
A. None whatever, no, sir.
Q. Would it cause you to become insubordinate to your military duties?
A. No, sir.

NATHANIEL O. GANDY, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. I show you an envelope (envelope addressed to Nathaniel O. Gandy, 1243 East Chelten Avenue, City, and not postmarked handed witness.) Is that your name and address?
A. Yes, sir.
Q. Will you open that envelope?

91 (Witness opens envelope and produces from the envelope printed leaflet entitled on the one side, "Long live the Constitution of the United States," and on the other side, "Assert

your Rights." The leaflet was identified by the initials of the witness.)

Leaflet and envelope offered in evidence are marked "Government's Exhibit No. 12, 12-20-17, W. E. M."

Q. Did you register last June?
A. Yes, sir.
Q. Were you examined by your Local Exemption Board?
A. Yes.
Q. Were you accepted?
A. Yes.
Q. Do you remember about when you were examined?
A. I think it was sometime in the early part of August.

Cross-examination.

By Mr. Nelson:

Q. Did you hear that circular read in court?
A. Yes, sir.
Q. If it had been delivered to you through the mails last August 28th, would the reading of it by you have caused you to become insubordinate?
A. No, sir.
Q. Would it have caused you to have tried to escape from the draft?
A. No, sir.
Q. Would it have caused you, if you had intended to volun-
92 teer, not to volunteer?
A. No, sir.

Redirect examination.

By Mr. Walnut:

Q. Did you see your name published in the newspaper?
A. Yes, sir.
Q. Among those accepted?
A. Yes, sir.

DAVID GUBLEBANK, having been duly sworn, was examined and testified as follows:

By Mr. Walnut:

Q. I show you an envelope. Do you recognize that as your name and address?
A. That is my name. It ought to be 509 Jackson.
Q. Did you ever see this envelope before?
A. No, sir.

(The envelope shown the witness is addressed to D. Gublebank, 508 Jackson Street, City, postmarked Philadelphia, Pa., August 25, 9.00 P. M., 1917, Station S.)

Q. Will you open that envelope?

(Witness opens envelope and takes from the envelope printed leaflet entitled on one side "Long live the Constitution of the United States," and, on the other side, "Assert your Rights" and the same is identified by the initials of the witness.)

93 Q. Did you ever see this leaflet before?
A. No, sir.

Envelope and leaflet offered in evidence and marked "Government's Exhibit No. 13, 12-20-17, W. E. M."

Q. Were you registered last June?
A. Yes, I was.
Q. Were you examined by your Local Board?
A. Yes, on August 8th.
Q. Were you accepted?
A. Yes. I was sent to Camp Meade November 4th and was rejected December 8th and came back.
Q. Did your name appear in the newspapers among those accepted?
A. Yes, sir.

Cross-examination.

By Mr. Nelson:

Q. Did you hear that circular read here yesterday?
A. Why, I didn't hear it all, no.
Q. Do you know what the contents of the circular are?
A. No, sir.
Q. I won't read it all to you but I will read some things in it to you and ask you a question. If you got a circular that starts out "Long live the Constitution of the United States. Wake up, America! Your Liberties are in Danger!", and that was followed by Section 1 of the 13th Amendment of the constitution which says,

"Neither slavery nor involuntary servitude, except as a pun-
94 ishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and further down it says, "The Conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the possession given him by the Constitution of the United States. He is deprived of all freedom of conscience being forced to kill against his will," and then it goes on and it says, "Conscription laws belong to a by-gone age. Even the people of Germany, long suffering the yoke of militarism, are beginning to demand the abolition of conscription." And it says, "Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch

Street, and sign a petition to Congress for the repeal of the Conscription Act." That is on one side. And then, on the other side, it says, "Assert your Rights" and various quotations from the constitution, such as Article 6, Section 2, that the constitution is the *frame* law of the land; Article 1, (Amendment) "Congress shall have no law respecting an establishment of religion or prohibiting the free exercise thereof." Article 9 (Amendment), "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." And it says here, "If
95 you do not assert and support your rights, you are helping to deny or disparage rights which is the solemn duty of all citizens and resident- of the United States to retain." A little later on it says, "You are a citizen, not a subject," and then it says, "Do not forget your right to elect officials who are opposed to conscription," and further on it says, "The people of this country did not vote in favor of war. At the last election they voted against war." And further it says, "Democracy cannot be shot into a nation. It must come spontaneously and purely from within. Democracy must come through liberal education. Upholders of military ideas are unfit teachers." Now, suppose you had received a circular like that, and at that time you had been accepted, I understand, for the National Army, would the receipt of such a circular as that have caused you to become very indignant against the United States and refuse to register?

A. I don't know what I would do, but I never took notice to things like that.

Q. That is, because somebody tells you that a law is unjust and tells you that a law is making a slave out of you, you don't immediately decide that you must erase that law, do you?

A. I don't know what I would do. I don't know. I never believed in anything. I do my own thinking. Nobody told me anything to do or anything like that.

Q. But it might have influenced you to sign a petition to
96 have the law repealed, might it not?

A. I don't know.

Q. Or it might have influenced you to vote to have the law repealed, if you had a chance to vote?

A. I don't know what I might do.

Q. Do you feel that under those circumstances it would influence you to become insubordinate towards the government and break the government laws toward carrying on the war?

A. No, I couldn't understand you there.

Q. You are positive that the receipt of a circular like that would not cause you to try to break the law with respect to drafting?

A. No, sir.

THAD A. SMITH, previously sworn, recalled.

By Mr. Walnut:

Q. I show you a leaflet taken out of a letter addressed to Horace C. Banks. Can you identify that as the leaflet printed by you for Mr. Schenck?

A. Yes, sir.

Q. I likewise show you a leaflet taken out of an envelope addressed to Frank Henderson. Can you identify that leaflet.

A. Yes, sir.

Q. And the one printed by you for Mr. Schenck?

A. Yes, sir.

Q. A leaflet taken out of a letter addressed to Robert Ander-
97 son. Can you identify that leaflet?

A. Yes.

Mr. Nelson: You can admit that, I think, to shorten the matter. That is, he identifies it as what?

Mr. Walnut: As a leaflet printed for Mr. Schenck.

Mr. Nelson: It is admitted that the witness would so testify as to the letter.

By Mr. Walnut:

Q. Pursuant to an order given to you last August by Mr. Schenck?

A. Yes, sir.

Mr. Walnut: Do you admit the identity of the leaflet contained in the envelope of the men appearing upon the stand here this morning?

Mr. Nelson: Yes.

SAMUEL O. WYNNE, heretofore sworn, recalled.

By Mr. Walnut:

Q. We have here a number of envelopes. Could you tell where these envelopes came from?

A. They were mailed in the Postoffice at Philadelphia, Pa., in different stations, and withheld from the mails by my directions.

Q. Did you withhold from the mails the other letters that were introduced here in evidence and that have been opened by the various witnesses?

A. Yes, sir.

Q. Did you withhold these for the same reason?
98 A. Yes, sir.

Mr. Walnut: If the court please, we haven't opened these letters, but we would like permission to open the letters in order to establish that they contain the same matter as is in the other envelopes.

Q. What do you base your conclusion upon that these envelopes contain these leaflets?

A. All letters were mailed in groups. I might say there were a lot of them mailed at the same time and the same place and in the same handwriting, and if you will examine some of them you will notice that the envelopes are thin enough that you can see it contains a printed circular. As to what that circular is, I don't know, and, under the orders of the Postmaster General, we have a right to withhold from the mails anything that we think is objectionable at this time, that might violate the Espionage Act and these letters, being of the same general appearance that the people had complained about that were opened, I directed all the letters in this handwriting and mailed about the same time to be withheld. As to what is in them, I don't know.

Cross-examination.

By Mr. Nelson:

Q. Well then, you were simply very lucky in striking the different witnesses yesterday who opened envelopes and finding they contained the same sort of letter in each case?

A. No, I don't think I would call it luck. I think I would call it good judgment.

99 Q. Now, wouldn't it be possible, we would say, for somebody who sent out a hundred of these circulars at one time and addressed all the envelopes in his handwriting, wouldn't it be possible that a private letter might be in the lot?

A. Oh yes, entirely possible, and I wouldn't say that there isn't some private letters in there. I don't know what is in those letters. I only took it for granted that they contained the same printed circular.

Q. And, if anything, you are better able to tell what is inside of these envelopes now than you were last August 28th, aren't you?

A. No, not at all. In the first place, I don't think there is any question what is in them. I don't think there is any question as to what is in the letters mailed on August 28th. I am just as sure of what was in them then as I am now, and that is, this printed circular.

Q. What you mean is that this circular appears to be printed with a heavy cheap sort of ink, filled with a lot of grease or oil and that has soaked into the envelope so that you can tell there is something black in there, and that ink had not a chance to soak into those envelopes on August 28th. Isn't that so?

A. No, I haven't seen envelopes where the ink has soaked in.

Q. But you are willing to admit that some of these letters might contain things other than these circulars?

A. I have examined each individual letter and I am convinced myself that they all contain the circulars that we have here. It is possible that they may contain something else. I can't testify as to what is in them.

100 Q. You have no fixed or magic way of finding out what is in the envelopes?

A. None whatever.

Q. And it is against the law for you or anybody else to open up first class mail?

A. It is strictly against the law and we would prosecute anybody who did it, whether our own employees or not.

Q. All of these envelopes are not the same?

A. The envelopes are not all the same, nor all in the same handwriting, nor all mailed in the same station.

Q. Some are two cent envelopes and some are cent envelopes and additional one cent stamp?

A. There are some there, some very few envelopes with one cent stamps and an additional stamp added.

Q. And they are not all the same handwriting?

A. No, sir.

Q. You have examined all of them?

A. I have.

Q. How many different kinds of handwriting do you say there are on those envelopes?

A. I don't believe I could tell you.

Q. Half a dozen?

A. Probably not over half a dozen.

Q. And how many different stations were the envelopes?

A. Well, I am not able to say positively, but I think four or
101 five perhaps. Most of them were mailed in Passyunk Station, which is down in South Philadelphia.

Q. That is near the Girard Estate, in South Philadelphia?

A. Yes.

Q. Outside of what you found in the Socialist Book Store you have no means of knowing who might have sent those envelopes, have you?

A. No, I don't know who mailed them. They were collected from letter boxes and we have no way to tell who mailed them to that particular letter box.

Q. Do you know whether or not all of the letters that were mailed from the Passyunk Station were deposited in one letter box?

A. I couldn't say that positively, but I believe they were all in one box, but I wouldn't be positive about it.

Q. Were there so few of them that they could all go in the one box from the Passyunk Station?

A. Oh, yes. When I counted them the other day I had 618, and they could all go in one letter box and probably three or four times that many more.

Q. Did you get any letters from any other source besides those four or five, or five or six stations that you think of?

A. Well, as I testified yesterday, we had some complaints that were written in, sending in the letters to us, and we had a number
102 of people who came in personally and complained about them and brought the letter with them that they had received.

Q. Did those letters show by the postmark that they came from many [illegible] that have taken all that were stopped?

A. Well, the letters are right there. I couldn't answer that until I see them.

Q. You might look at some of them and tell me if they came from different stations.

A. Mr. Chairman, I object.

Q. Is that different from any of the other lot?

A. I don't know about that. [illegible] Q'Connell and Cochran [illegible], which is at 10th and Federal Streets, and the one to Hardy is O'Connell Station and the one to Henderson is O'Connell Station.

Q. So that they came from different parts of the city?

A. Yes, I think four or five different stations, maybe six.

Redirect examination.

By Mr. Wilson:

Q. Do you have very many of those letters now?

A. Of the 100, I think there were about 500 opened by the at[illegible]

Q. Did you find that you had gotten very much private correspondence from those 500 letters that were opened?

A. I didn't get any.

Mr. Wilson. We would like to offer those letters in evidence, and, at the direction of the court, we might open them to see if [illegible] have bullets in the same as the bullets produced [illegible].

The Court. You might, if you had the direction of the court to do it. I haven't had counsel cite to me any authority to open letters addressed to people taken out of the mail.

Mr. Wilson. Well, I think we have sufficient evidence concerning the letter to dispose of that question.

By Mr. Wilson:

Q. I show you again this printed book.

Mr. Wilson. My purpose in doing that, if the court please, is to introduce the resolutions that were introduced for or against all the defendants.

The Court. For the purpose of what?

Mr. Wilson. We have introduced certain resolutions in evidence which were admitted against two defendants. I would like now to offer them in evidence against all the defendants.

Mr. Tolley. I object to it on the same ground for the reason made a like objection thereto by most of counsel to it, as against his self and that you can't incriminate him by taking his papers, books and so on, and using them against him. I object to it further for fear it be here as evidence as to the fact the typewriting in that book. I object because the book is a loose leaf book and might easily be

changed around and confused with other pages and does not show chronologically running along of dates or business for a Board of Directors such as we have to deal with here, and, furthermore, so far as I can recall, the alleged resolution does not state who was present at the meetings. It doesn't say who was present and who voted on that particular resolution. I don't see how you can connect up either two or five people with it.

Mr. Wallace: The evidence of who was present at the meeting would have to appear by the minute book, and, for that purpose, I would like to offer the entire minutes in evidence. My further evidence, of course, of consistency, consists of the work in the store. Miss Simanowitz, who stated that these defendants were members of the executive committee.

The Court: Did she?

Mr. Wallace: She stated so far as she knew they were, and identified them.

The Court: It seems to me that she stated she had been told they were and she was never present at any of the meetings. Now, in criminal cases, how can you take testimony of that sort and offer it in evidence to convict people, the mere evidence of the girl that she heard somebody say, doesn't say who said it. There are so many objections to this, I don't want to indicate any special objection that arises in the mind of the court, but it is for Mr. Nelson to present whatever particular objection he is going to insist on. Mr. Nelson has made so many grounds of objections.

Mr. Nelson: Those are papers taken, sir, from the headquarters.

The Court: I haven't heard any evidence yet that these three defendants had anything to do with those headquarters. Of course, it is not for the court to raise the objection.

Mr. Wallace: I say it comes in the minutes, and that the minutes is the best evidence.

The Court: Do you mean to say that you can produce minutes from any corporation or of any set of men carrying on business, that those minutes are evidence against anybody that happens to be mentioned in the minutes. Is that your contention?

Mr. Wallace: Of course, that is our contention.

The Court: What theory of law of evidence is there to sustain that contention?

Mr. Wallace: Of course, it is the only record outside of the defendants themselves that exists upon which you can prove that they were there. Now, if that is not sufficient, of course, we can't prove it.

The Court: Why do you say that is the only evidence that could be produced? I presume there are other people who belong to the Socialist Party besides these five men.

Mr. Wallace: Well, we don't know anybody that could establish that they were members of the executive committee, and the only way we have is by these minute books.

The Court: Who appoints the executive committee?

Mr. Wallace: I assume the chairman, that is, if there is a chairman.

The Court: The point is that I cannot see that you have offered anything except hearsay evidence against these three people. Take

the minutes themselves. What are they? They are the declaration of somebody and, in the absence of any direct evidence that they were there and took part in the management or that they were there at the meetings, or anything of that sort, I don't see how the court — to take the evidence as against them.

Mr. Walnut: My contention is based on the fact that this is the best evidence that we could get and I think it is probably the best evidence that could be relied on.

The Court: That would probably be true in a civil case against a corporation. Their own minutes are the best evidence against them but, in a criminal case of conspiracy, you have got to prove the people who are charged with being conspirators took some part in the conspiracy. Now, you cannot just go to a written declaration of somebody else and offer that in evidence against them to show that they took part in it. There is no evidence at all up to this time to show they took any part in the sending out of these circulars.

Mr. Walnut: I will withdraw my offer.

Government closes.

107 Mr. Nelson: I move that as no case has been made out against the defendants, the jury be instructed to find them not guilty.

The Court: I will not allow that motion as against Dr. Baer and Mr. Schenck. As to the other three defendants, the government has not offered any evidence sufficient for a criminal case to go to the jury but, as to the two defendants, Dr. Baer and Mr. Schenck, there is sufficient evidence to make out a prima facia case. Under these circumstances, I will overrule the motion as to these two defendants.

Mr. Walnut: We will have to noll pros the proceedings against the other three defendants.

The Court: Then, as I understand, as to Sehl, Root and Higgins, the District Attorney withdraws the prosecution.

Mr. Walnut: We withdraw the prosecution.

Exception noted for defendants as to the refusal of the court to instruct the jury to find the defendants Elizabeth Baer and Charles T. Schenck not guilty.

Defendants' Evidence.

HENRY JOHN NELSON, having been duly sworn, was examined and testified as follows:

By Mr. Gibbons:

Q. What is your occupation?

A. Lawyer.

Q. How long have you been in practice?

108 A. Twelve or thirteen years.

Q. What was your occupation before that?

A. Newspaper man.

Q. Have you served in the Army?

A. Yes, I did. I have an honorable discharge from the United States Army and the National Guards of Pennsylvania.

Q. At what time did you serve?

A. Back in the Spanish War.

Q. Among other clients, you represent the Socialist Party, do you not, of Philadelphia?

A. Yes, sir.

Q. How long have you represented them?

A. About ten years.

Q. Will you just state, in your own way, what knowledge you had, if any, regarding this circular?

A. I know the circular which has been offered in evidence is one-half a reprint from another circular. I don't just remember the name. After the war started, and while the agitation was going on as to whether or not we would have a conscription, there was a circular printed with "Long live the Constitution of the United States," and there were thirteen Socialists arrested by the police out in West Philadelphia for distributing that from door to door and that is one-half of this present circular.

Q. What happened to those Socialists?

Mr. Walnut: I would like to know the extent of this investigation. I don't see what relevancy the action of the court in reference to some other men has upon this particular case.

The Court: The witness has not been asked any questions as to the action of the court.

Mr. Walnut: He was asked what happened.

Mr. Nelson: In connection with this circular.

By Mr. Gibbons:

Q. What happened?

A. Well, as a result of what the court did, these other men were held for the Federal authorities and I brought this circular, "Long live the Constitution of the United States" down to the District Attorney's office, and I had a talk with the District Attorney and I don't think I talked to Mr. Garbarino about it. He was busy at the time, but I did talk to his assistant, Mr. Daniel.

Q. By the District Attorney you mean Mr. Kane?

A. Yes, and I told him this was the circular these people had been arrested for distributing and that they had been held for the action of the Federal authorities. I know that the result was that the Federal authorities did not take any action against these thirteen men.

Q. They were all discharged?

A. Yes.

Q. What part of that circular was the reprint?

A. This side which states, "Long live the Constitution of the United States," and closes up by saying, "Come around to 1326 Arch Street and sign your petition to Congress for the repeal of the Conscription Act."

Q. This is not the only circular that has been circulated from the Arch Street headquarters, is it?

A. Oh no, every couple weeks or so there is a new circular.

Q. And they are still issuing circulars?

A. Yes. The headquarters are still open there and defendant Schenck is not a member of the executive board. I know that of my own personal knowledge, but Dr. Baer is. Schenck is simply paid as secretary.

Cross-examination.

By Mr. Walnut:

Q. Who is a member of the executive committee?

A. Mr. Sehl is a member of the executive committee and Mr. Root and Mr. Wanamacher.

Q. Mr. Higgins?

A. No, I think Mr. Higgins was not a member, or he was not a member at that time. I don't know just what he was. I know nothing at all about anything of this sort.

Q. You spoke about one side of this circular only, didn't you?

A. Yes, just one side.

Q. And you spoke about what was done about some cases out in West Philadelphia. Do you know the circumstances surrounding the distribution of the circular in West Philadelphia?

A. Yes.

Q. You know it was not distributed to men particularly accepted for service?

111 A. Oh yes, it was. That is one of the points. They distributed some to soldiers in uniform in West Philadelphia.

Q. But not in that case that you are speaking of?

A. Yes, the thirteen.

Q. Aren't you speaking now of another case?

A. I think it was that case.

Q. You are now thinking of another case where an arrest was made?

A. No, I think not. I don't think it was intentional. They were driven that way and the Soldiers came along and got the circular.

Q. You are thinking of another case.

A. Well, it may be. I am not quite certain as to that.

Q. It was after this early period of agitation that this second portion of the leaflet was printed, wasn't it?

A. Well, it was about two weeks afterwards. I don't know just how long it took, but a couple of weeks to get rid of the first lot and in making up the next lot, they decided to print something on the other side.

Q. Do you know anything about these other cases where arrests were made and the circulars had been distributed to men in uniform?

A. Do I know anything about it?

Q. Yes.

A. Yes.

112 Q. When was the arrests made, do you remember?
A. Well, I don't know the exact date. There were so many arrests and so many raids. It has been since August. I know it was the latter part of the summer.
Q. That first circular was printed before June 15th, wasn't it?
A. No, I think not. I think that first circular was printed in the latter part of July or the beginning of August.

Defense closes.
Testimony closed.

113 In the United States District Court for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES

vs.

CHARLES T. SCHENCK et al.

Penal Code: Violation of Espionage Act.

Charge: Treason.

Before Hon. J. Whitaker Thompson, P. J., and a Jury.

Charge of the Court.

GENTLEMEN OF THE JURY: In the case which is now before you for consideration, the defendants, Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins, are charged with conspiracy to violate the provisions of what is known as the Espionage Act, and are charged in another count with violation of that act in relation to sending things through the mail. Before going any further in the discussion of the case, I will say to you that the government has failed, as you gather from what was said, to produce sufficient evidence to connect Charles Sehl, Jacob H. Root and William J. Higgins with the conspiracy charged in the indictment and, as to them, you are therefore, directed to return a verdict of not guilty. So that your consideration of the case is based upon the indictment and the evidence produced to connect Charles T. Schenck and Elizabeth Baer with the conspiracy and the act charged
114 in the indictment.

Now, in order to understand just what is charged here, I will read the provisions of the Act of June 15, 1917, under which this indictment is framed. In the first place, the act prescribes a penalty or penalties against whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces of the United States, or whoever shall wilfully obstruct recruiting or enlist-

ments in the service of the United States to the injury of the service or of the United States. Then again it provides that if two or more persons conspire to violate the provisions of Sections two or three of this Title and one or more of such persons does any act to affect the object of the conspiracy, each of the parties to said conspiracy shall be subject to the penalties of the act. Then again, in a subsequent part of the act covering the use of the mails, the act makes certain matter unmailable and prohibits its being carried in the mail, and then it provides that every circular or other publication, matter or thing of any kind containing any matter advocating or urging treason, insurrection, or forceable resistance to the law of the United States is hereby declared to be non-mailable and imposes a penalty upon anybody who uses or attempts to use the mails or Postoffice service of the United States for the transmission of any matter declared by this Title to be unmailable.

115 This indictment is set out in three counts. In the first count the defendants are charged with a conspiracy to do the thing that is prohibited by the act, that is to wilfully cause or intend to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and to obstruct recruiting and enlistment in the service of the United States to the injury of the United States when the United States is at war, and, in order to affect the object of the conspiracy it is charged that copies of the circular which has been offered in evidence in the case and, in order to affect the object of the conspiracy it is charged that the defendants adopted resolutions, which you have heard read in evidence, at the meetings of the Executive Committee of the Socialist Party and that the defendant Schenck directed the printing of the circular and that he caused the circulars to be distributed and distributed them, together with stamped envelopes and that he caused them to be distributed to people entering on the premises of the headquarters of the Socialist Party.

The second count in the Bill of Indictment charges a conspiracy to commit an offense against the United States, that is to say to use and attempt to use the mails and Postoffices of the United States for the transmission of non-mailable matter, declared non-mailable in the section of the act I have referred to, and it charges similar acts in pursuance of that conspiracy to those charged in the first count.

116 The third count charges not a conspiracy but the knowing and wilful and unlawful use of the mails and Postal service, of the United States to send through the mails these circulars that have been offered in evidence, and charges, as in the other counts, that the circulars were calculated to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States.

Now, taking into consideration the conspiracy charges. A conspiracy means the uniting together of two or more persons with a common object or purpose in mind to accomplish that purpose and, under the law *the* of the United States, a conspiracy is not complete until some one of the conspirators has done some act in carrying out

the purpose of the conspiracy. It is immaterial in a conspiracy case whether or not the purpose of the conspiracy was actually accomplished if the evidence satisfies the jury beyond a reasonable doubt that there was a conspiracy to do the prohibited act and that some act was done by some one of the conspirators as charged in the indictment to carry out that purpose, whether or not the unlawful purpose actually resulted. Therefore, in considering the conspiracy counts, you will take into consideration the evidence and determine whether or not Dr. Baer and Mr. Schenck were united together in a common purpose to affect a certain object and whether, as
117 charged in the indictment, Dr. Baer or Mr. Schenck did the acts that are charged in the indictment.

Now, in the first place, before going into the evidence and the further consideration of the charges of conspiracy, bear in mind in this case as in all criminal cases, that the defendants are presumed to be innocent. In the courts of the United States, the defendant, when brought into court for trial, comes into court with the presumption of innocence in his favor, and that presumption remains with him throughout the trial and, throughout the trial, the burden therefore is upon the government to offer evidence to satisfy the jury beyond a reasonable doubt of the guilt of the defendant and of the commission of the acts charged in the indictment before the jury are justified against that presumption of innocence in returning a verdict of guilty.

In this case, it is urged that the two defendants had the common purpose in mind of causing insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, and had the purpose in mind of obstructing recruiting and enlistment in the service of the United States by sending out to soldiers, sailors, and to young men who were subject to draft these circulars with the purpose of affecting them as stated in the indictment. So that the question for the jury to consider is whether, in the
118 first place, Dr. Baer and Mr. Schenck were acting in concert with the common purpose in mind of accomplishing that result. It is not necessary in a conspiracy case to show that the parties actually met and entered into an agreement formally, or verbally made an agreement between themselves, or took any definite means to express an agreement between themselves, but there must be a common purpose in their minds, their minds moving along in the same channel with a common purpose and that purpose can be proved by the acts of the parties and surrounding circumstances without proving that there was any definite agreement between them as to that purpose.

It is for you to determine then whether there was a conspiracy or agreement of that sort between these parties and whether the purpose of that agreement was to cause insubordination and so on among the soldiers and sailors, and whether its purpose was also to obstruct recruiting and enlistment in the service of the United States. You have heard the testimony and you have had introduced in evidence the circular upon which the government bases its charge. The de-

fendant's counsel contends that the purpose was an innocent one, and, of course, under the rules of evidence of the United States court, that is the presumption. It is contended on behalf of the defendants that the circular was simply intended to express the thought that the Conscription Law was unconstitutional and intended
119 to advocate its repeal. As I say, there is a presumption of innocence and that presumption accompanies that act as it does anything else. Any citizen of the United States or any person in the United States may have an honest difference of opinion with other citizens and other persons in regard to the wisdom of an act of Congress or in regard to its constitutionality, and all citizens have a right to speak and write and urge other people to speak and write in order to obtain the repeal of any law which does not appeal to them as being a wise law, or appeals to them as being unconstitutional. It is not for us, or for the Jury, to determine at this time whether the act is unconstitutional or not, or whether it is a wise law. The question for you to determine is whether the defendants, in the exercise of their right of free speech, were using that right in violation of this Act of Congress known as the Espionage Act by having the purpose in mind when they sent these circulars out other than the proper purpose of merely causing people to use their influence with Congressmen to obtain the repeal of the act, and whether that other purpose was the purpose of causing insubordination, disloyalty, mutiny, refusal of duty on the part of the soldiers and sailors in the service of the United States, or whether it had another purpose of obstructing recruiting and enlistment of men into the service of the United States. You will take the circular and give it due considera-
120 tion. Examine it carefully and determine, under all the circumstances in the case, what, beyond a reasonable doubt, in your mind, was the purpose and object in sending out that circular. You will take into consideration the fact that it was sent out at a time in the exigencies of this war when the United States, along with other nations, is confronted with a situation which is unparalleled in the history of the world; at a time when young men were being drafted into the service of the United States; that this circular was then sent out; and determine whether, under the evidence, as you have heard it, there was a purpose to send that circular especially to young men who had been accepted in the draft; whether, under those circumstances, and under all the other circumstances of the case, bearing in mind the presumption of innocence, you are satisfied beyond a reasonable doubt that the purpose of this alleged conspiracy, if you believe a conspiracy existed, was to do what is set out in the indictment and what is prohibited by the Act of Congress. You have heard testimony from the minutes of the meetings of the Executive Committee consisting of the resolutions that "fifteen thousands of these leaflets be written or printed on the other side of the leaflets now in use to be mailed to men who have passed the exemption board and also distribution" and "the secretary to get bids of the prices of printing," and you have heard the testimony as to "comrade Schenck being authorized to spend One hundred and twenty-five dollars for sending leaflets through the mail."

121 You have also heard the other testimony in the case as to the distribution of these circulars. You have heard the testimony of counsel for the defendants as to previous distribution of circulars containing on one side of these circulars sent out in this case, circulars printed in this case, and you will take into consideration his testimony in regard to what had formerly been done and as to the action of the United States authorities in the previous case, and as to whether, in your opinion, that was evidence such as to justify the defendants in their own minds in doing what they did and to show a lawful and not unlawful purpose in what they subsequently did. You will take into consideration all of the testimony on the part of the defendants as testified to by their counsel, and all the testimony on the part of the government, bearing in mind, however, the presumption of innocence and, if you are satisfied beyond a reasonable doubt that this conspiracy existed between Dr. Baer and Mr. Schenck and that the purpose of the conspiracy was as stated in the indictment and that either of them did any of the acts charged in the indictment in pursuance of that conspiracy, then you will be justified in returning a verdict of guilty on the conspiracy charges. If, however, the evidence is not sufficient to satisfy you beyond a reasonable doubt that the defendants did conspire together and that they did have that purpose in that conspiracy, and that one or the other or both of them did any of the acts charged in carrying out the conspiracy, then it will be your duty to acquit on
122 the conspiracy charges.

The other charges, contained in the third count, are based on the violation of the law in relation to the use of the United States mails. It is charged there that Mr. Schenck and Dr. Baer, of course leaving out the other defendants who are to be acquitted, used and attempted to use the United States mails for the transmission of mail matter declared to be non-mailable under this act. Now, the mail matter that is declared to be non-mailable as applied to this case, consists of circulars or other publications containing any matter advocating forceable resistance to any law of the United States. It is for you to determine whether the government has satisfied you beyond a reasonable doubt, first that the circulars sent through the mail advocated forceable resistance to the Conscription Act by causing insubordination, disloyalty, mutiny, refusal to obey orders or forceable resistance to the recruiting and enlistment service. If the evidence is such that, after consideration of the circulars sent out, you determine that it did advocate forceable resistance, determine that beyond a reasonable doubt, and you find, in view of what was done by Dr. Baer and Mr. Schenck, that either of them did use the mails in sending that circulars or cause the use of the mails for that purpose, if you are satisfied of that beyond a reasonable doubt, then it will be your duty to find a verdict of guilty against
123 both of them or either one of them as to whom you find the evidence applies. If, however, you are not satisfied beyond a reasonable doubt that either of them used the mails or caused the mails to be used, or if the government has not satisfied you beyond a reasonable doubt that both of them or either of them used or caused

the use of the mails, then they are not guilty. Bear in mind, in considering the whole case, all counts, the jury must be satisfied of the guilt of the defendants beyond a reasonable doubt, and that reasonable doubt must be resolved in favor of the defendants at any point in the case wherever it arises. It is for the government to remove that doubt from your mind. If you are satisfied beyond a reasonable doubt that the government has offered satisfactory proof on all the counts in the indictment, you would then be justified in returning a general verdict of guilty against these two defendants upon all the counts in the indictment but, if that doubt arises as to any count, as to that count you will find a verdict of not guilty. As I instructed you before, your verdict should be not guilty as to Charles Sehl, Jacob H. Root and William J. Higgins.

I have been asked to charge you upon certain points presented by counsel for the defendants.

The first point is declined.

The second point:

"2. If the defendants, or any of them, did not testify in his own behalf, his failure to do so should not be considered as evi-
124 dence of guilt on his part." That point is affirmed.

"3. If you have a reasonable doubt as to the guilt of the accused, you should resolve that doubt in favor of the accused; that your verdict should be 'not guilty.'" That point is affirmed.

The fourth point is declined.

The fifth point applies to evidence on the part of the government officials as to statements made by the accused. In order that statements made by the accused should be received in evidence at a time when they were in custody or examined by officers who had warrants for their arrest, it is essential that the statements should be voluntary statements on their part and not obtained through any duress or any threats or promises or anything of that sort and, in this case, it has been testified that—I think it was Mr. Garbarino, either Mr. Garbarino or Mr. Cortelyou—informed the defendant Schenck that any statement that he might make would be used against him. That is to say that either of these witnesses testified to the effect that the defendant Schenck thereupon called up the attorney and was advised not to make any statement and afterward, although advised not to make any statement, did make statements. Now, if you believe the testimony of Mr. Cortelyou or Mr. Garbarino, whoever it was who testified to that effect, that would be sufficient evidence, if you are satisfied beyond a reasonable doubt, to base a finding
125 on your part that the statement was voluntary and that it was not made under duress or threats or extorted from the defendant by force or by any other unlawful means. So that it is a question of fact for you to determine whether that was said or not, whether the defendant was warned as stated. I do not recall whether there was any evidence on that point as to Dr. Baer or not.

Mr. Walnut: Mr. Wynne stated he was the Postoffice inspector when he went in and showed her his commission.

The Court: As I recall it, there was no statement testified to on the part of Dr. Baer at any time when she was under arrest or about

to be arrested. At all events, as to the other defendant, you will determine from the evidence whether the statements he made were made voluntarily or whether such statements were made. If not made voluntarily, if they were made under duress then, of course, you will not take them into consideration at all, but, if they were made voluntarily, if you find that to be a fact, then you can take them into consideration along with all the other evidence in the case, under the same rules of evidence. With that explanation, I will read the fifth point presented.

"5. Statements alleged to be made by the accused to officials or agents of the government, unless prefaced by a warning that answers thereto would be used against the accused, must not be considered by the jury in determining the guilt of the accused." That point is affirmed.

126 "6. Unless the government has shown you that the accused advocated violation of and disobedience to the Conscription Law, he, or they, cannot be convicted, and your verdict should be 'not guilty.'"

Well, unless you find that the accused did so advocate the violation of and disobedience to the Conscription Law, or that they conspired to do that and some act was done in furtherance of the conspiracy, your verdict should be not guilty.

"7. If the accused did not wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces, or did not wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States, your verdict should be 'not guilty.'" That point is affirmed, if you find that they did not do these things or did not conspire to do them. The fact, as I have stated to you before, that the object of the conspiracy was not accomplished, if you find conspiracy existed or was carried on or some act was done in furtherance of the conspiracy, is not material.

"8. The real inquiry here is can the government show always beyond a reasonable doubt that these defendants were trying to persuade people to disobey the law; or has the government only succeeded in showing you that these defendants were merely

127 trying to persuade people to try to have a law changed. If the latter is the case, your verdict must be 'not guilty.'" I will affirm that point with the qualification that the government must show beyond a reasonable doubt that the defendants were either trying to persuade people to do it or conspired to try to persuade people to do it.

The ninth point is declined.

"10. The accused had as much right to urge the repeal of a law on the consideration of soldiers as on that of any other citizens." That point is affirmed, provided that the purpose in bringnig it to the consideration of soldiers was exclusively that purpose or rather was that purpose and not the purpose set out in the indictment.

Mr. Walnut: If the court please, may I draw your attention particularly to count three in the indictment. I don't think it is

necessary, under the act, for the mail matter to advocate forcible resistance. I think Section one of Title twelve provides that any circular or leaflet or any written matter that violates Section three under which the first two counts are drawn, is non-mailable.

The Court: Well, gentlemen of the jury, in regard to the third count, the law makes every circular non-mailable which is in violation of any of the provisions of this act and, as I have stated to you before, prohibits the use of the United States mails in the transmission of any matter declared to be non-mailable. Among
128 other things that the act prohibits is the act that I referred to before, that is causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and of obstructing the recruiting and enlistment service of the United States to the injury of the United States. So that in consideration of the third count, the District Attorney requests me to charge you that if you are satisfied beyond a reasonable doubt that the circulars were such as to cause insubordination and so on, and obstruction to the enlistment and recruiting service, that it is not necessary that they shall advocate forcible resistance to the law of the United States. I don't think there is very much distinction between them but I point that out to you for your consideration.

Mr. Nelson: Will your Honor grant me an exception to that portion of your Honor's charge where you spoke of the fact that the jury should consider whether or not if these circulars were sent out to these young men liable to draft it was any indication that the law had been violated or that they had intended to violate the law.

Exception noted for defendants by direction of the court.

On the request of counsel for defendants the court also directed that an exception be noted to the refusal of the court to
129 affirm the points submitted by the defense which were declined.

The points submitted by the defense and declined by the court are as follows:

"1. Under all the evidence, your verdict should be 'not guilty.'"

"4. If the jury can only determine guilt on the part of the accused from evidence based on books, papers, printing or writing taken from the accused by government officials or agents, then their verdict should be 'not guilty.'"

"9. Under the first Amendment to the Constitution freedom of speech and of the press cannot be abridged, and people can only be held responsible for the results of their utterances. If, therefore, the government has not shown you that any injury was caused to the service of the United States or to the United States as a result of the utterances alleged against these defendants, then your verdict should be 'not guilty.'"

Verdict.

As to defendants Charles T. Schenck and Elizabeth Baer, guilty, the jury recommending the defendants to the clemency of the court.
As to defendants Charles Stiff, Jacob H. Rose and William J. Higgins, not guilty.

On motion of counsel for defendants the court directed
130 that the notes of testimony be transcribed and filed of record.

131 And thereupon, the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendants did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendants did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this sixth day of March, 1918.

J. W. THOMPSON, [L. S.]
District Judge.

132 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 122.

United States of America

vs.

Charles T. Schenck, Charles Stiff, Elizabeth Baer, Jacob H. Rose and William J. Higgins.

Upon Motion for New Trial.

Mar. 1, 1918.

Thompson, *J.:*

The jury was directed to acquit the defendants Stiff, Rose and Higgins, because there was not sufficient evidence to connect them with the charge in the indictment.

The motion for a new trial as to Charles T. Schenck and Dr. Elizabeth Baer is based upon the claim that there was not sufficient evidence to establish a conspiracy between them.

The principal ground of error urged is the action of the court in admitting in evidence the minutes of the meetings of the Executive

Committee of the Socialist Party on August 13th and August 20th, 1917. The evidence showed that Schenck was General Secretary of the Socialist Party; that the typewritten minutes and the notes in long-hand were found in his office at the headquarters of the Socialist Party, of which he was in charge, and were identified by him as such, and the long-hand notes were stated by him to be those of the Secretary. There was testimony to show that Schenck ordered the circulars printed and that they were distributed from the headquarters. There was testimony that the minutes were admitted by Dr. Baer to be hers. In the minutes her name appears as secretary of the meeting. It was further shown by the mouth of the defendants' own witness that she was a member of the executive committee. The minutes were therefore evidence, at least, against her as admissions by her of acts done with others "to the Grand Inquest unknown" and relevant and material to show her
133 connection with the alleged conspiracy and overt acts in its accomplishment. There was evidence that what was proposed in the minutes was carried out by Schenck as General Secretary of the Socialist Party, that the plan adopted by the resolution of August 13th was ratified and further instructions given to Schenck at the following meeting on August 20th after the preparation and printing of the circulars, and that thereafter the circulars were distributed at the office under his charge and were sent through the mails to men who had been accepted in the draft. The minutes were therefore clearly admissible against him as declarations and acts showing a common design in the transaction and in and of themselves forming part of the circumstances in which the alleged conspiracy was formed and carried out. The minutes therefore not only affected Dr. Baer, but her associate in the common enterprise, Schenck. And it is immaterial at what time Schenck joined the conspiracy or whether he was present at the meetings, provided he and Dr. Baer were joined in carrying out the common design.

U. S. v. Logan, 45 Fed. 872;
U. S. v. Cassidy, 67 Fed. 698;
U. S. v. Cole, 25 Fed. Cas. No. 14,832;
Sommer v. Sommer, 160 Pa. St. 129;
Palmer v. Gilmore, 148 Pa. St. 48;
McCabe v. Burns, 66 Pa. St. 356;
Stewart v. Johnson, 18 N. J. Law, 87;
McCaskey v. Graff, 23 Pa. 321.

I am of the opinion that the minutes were evidence not only against Dr. Baer, but against Schenck, and that there was sufficient evidence from which the jury could find the conspiracy and overt acts in furtherance thereof.

Motion denied.

134 *Judgment.*

And now, this twenty-first day of March, A. D. 1918, all and singular the premises being seen and by the Court here fully under-

stood, it is considered and adjudged that the defendant, Elizabeth Baer, be imprisoned and confined in the Philadelphia County Prison at Philadelphia, Pennsylvania, for the term of ninety days from this eleventh day of March, 1918, and pay a fine of Five Hundred Dollars and costs of prosecution, and stand committed until judgment be fully complied with.

135 *Judgment.*

And now, this twenty-first day of March, A. D. 1918, all and singular the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Charles T. Schenck, be imprisoned and confined in the Mercer County Jail, at Trenton, New Jersey, for the term of six months from this eleventh day of March, 1918, and pay costs of prosecution and stand committed until judgment be fully complied with.

136 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT, and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Petition for Writ of Error.

Filed Mar. 21, 1918.

And now comes Charles T. Schenck, one of the defendants herein, and says:

That on or about the 11th day of March, 1918, the District Court entered judgment herein in favor of the plaintiff and against this defendant, whereby this defendant was sentenced to six months imprisonment and costs of prosecution, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the

record, proceedings, and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

HENRY J. GIBBONS,
HARRY JOHN NELSON,
By H. J. G.,
MORRIS HILLQUIT,
By H. J. G.,
Attorneys for Defendant.

137 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

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CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT, and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Order Allowing Writ of Error.

Filed Mar. 21, 1918.

This 21st day of March, 1918, comes the defendant, Charles T. Schenck, by his attorneys, and files herein and presents to this Court his Petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States. and that such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $5,000.00 which shall operate as a supersedeas bond.

J. W. THOMPSON, *J.*

138 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA
vs.
CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT, and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Assignment of Errors.

Filed Mar. 21, 1918.

The defendant in this action, Charles T. Schenck, in connection with his Petition for a Writ of Error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

(I.) The Court erred in the admission of evidence offered by the plaintiff in the following instances, to wit:

(1) In the testimony given by the witness, Samuel O. Wynne, in substance setting forth his conversation with the defendant, Elizabeth Baer, on September 12th, in the absence of the witness testifying that he had cautioned this defendant that, if she made any statement, she made it with the knowledge that it might be used against her (pages 189 to 191 of the notes of testimony).

(2) In the testimony given by the witness, Samuel O. Wynne, in the introduction in evidence of certain resolutions contained in the minutes of August 13th and 20th, seized upon the premises, 1328 Arch Street, under a search warrant, in substance, as follows: "On August 13th there appeared here in the minutes under the heading "New Business" the following: "M. and S. that 15,000 leaflets be written or printed on the other side of the leaflet now in use to
139 be mailed to men who have passed exemption boards, also distribution.

"M. and S. Secretary gets bids on price of leaflets."

"On August 20th, under the general secretary's report, it says, 'Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing,' and, under unfinished business was, "M. and S. That Comrade Schenck be authorized to spend $125.00 for sending leaflets through the mail. Carried." (Page 196.)

(3) In the testimony given by the witness, Samuel O. Wynne, in the introduction in evidence of minutes above referred to because they were taken from a loose leaf book. (Page 197.)

(4) In the testimony given by the witness, Samuel O. Wynne, in the admission of newspaper clippings found by him in a desk at 1326 Arch Street on August 28, 1917, which, in substance, contained lists of names alleged to be those of persons called in the selective service act (pages 199 and 200).

(5) In the testimony given by the witness, Samuel O. Wynne, in the admission of stacks of circulars found at 1326 Arch Street, alleged, in substance, to be copies of the circular upon which the prosecution of the defendant was based (page 200).

(6) In the testimony given by the witness, Clara Abramowitz, concerning, in substance, the use made of certain newspaper clippings found in a desk at 1326 Arch Street (pages 230 and 231).

(7) In the testimony given by the witness, E. J. Carr, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 237 and 238).

(8) In the testimony given by the witness, Louis M. Passarello, in the offer in evidence of a circular and envelope containing
140 the same addressed to the witness (pages 240 to 242).

(9) In the testimony given by the witness, John Rule, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 244).

(10) In the testimony given by the witness, Robert Anderson, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 245 and 246).

(11) In the testimony given by the witness, Horace F. Banks, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 247).

(12) In the testimony given by the witness, Harry J. Kohler, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 249).

(13) In the testimony given by the witness, Frank Henderson, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 251 and 252).

(14) In the testimony given by the witness, Howard L. Bill, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 254).

(15) In the testimony given by the witness, Leonard Allen, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 255).

(16) In the testimony given by the witness, Nathaniel O. Gandy, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 257).

(17) In the testimony given by the witness, David Gublebank, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 259).

141 (II.) The Court erred in refusing to strike out testimony regarding certain resolutions appearing in portions of minutes taken from minute book alleged to have been kept by the defendant, Elizabeth Baer, as secretary, unless the circular, on account of the mailing and distribution of which the defendant was indicted, was connected with this particular resolution (pages 188 and 189).

(III.) The Court erred in overruling the motion on behalf of the defendant that the jury be instructed to find the defendant not guilty (page 273).

(IV.) The Court erred in making the charge to the jury in refusing to state propositions requested by the defendant in the following instances, to wit:

(1) The first point for charge, which was as follows: "Under all the evidence, your verdict should be 'not guilty.'" (Page 288.)

(2) The fourth point for charge, which was as follows: "If the jury can only determine guilt on the part of the accused from evidence based on books, papers, printing or writing taken from the accused by government officials or agents, then their verdict should be 'not guilty.'" (Page 289.)

(3) The ninth point for charge, which was as follows: "Under the first Amendment to the Constitution freedom of speech and of the press cannot be abridged, and people can only be held responsible for the results of their utterance. If, therefore, the government has not shown you that any injury was caused to the service of the United States or to the United States as a result of the utterances alleged against these defendants, then your verdict should be 'not guilty.'" (Page 292.)

(V.) The Court erred in using the following language
142 in the charge to the jury: "You will take into consideration the fact that it was sent out at a time in the exigencies of this war when the United States, along with other nations, is confronted with a situation which is unparalleled in the history of the world; at a time when young men were being drafted into the service of the United States; that this circular was then sent out, and determine whether, under the evidence, as you have heard it, there was a purpose to send that circular especially to young men who had been accepted in the draft; whether, under those circumstances, and under all the other circumstances of the case, bearing in mind the presumption of innocence, you are satisfied beyond a reasonable doubt that the purpose of this alleged conspiracy, if you believe a conspiracy existed, was to do what is set out in the indictment and what is prohibited by the Act of Congress."

(VI.) The Court erred in refusing to grant a new trial to the defendant.

Wherefore the defendant prays that the judgment of the District Court may be reversed.

HENRY J. GIBBONS,
HENRY JOHN NELSON,
By H. J. G.;
MORRIS HILLQUIT,
By H. J. G.,
Attorneys for Defendants.

143 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH A. BAER, JACOB H. ROOT and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Petition for Writ of Error.

Filed Mar. 21, 1918.

And now comes Elizabeth Baer, one of the defendants herein, and says:

That on or about the 11th day of March, 1918, the District Court entered judgment herein in favor of the plaintiff and against this defendant, whereby this defendant was sentenced to imprisonment for ninety days and to pay a fine of Five hundred dollars and costs of prosecution, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

Wherefore this defendant prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY J. GIBBONS,
HENRY JOHN NELSON,
By H. J. G.;
MORRIS HILLQUIT,
By H. J. G.,
Attorneys for Defendant.

144 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Order Allowing Writ of Error.

Filed Mar. 21, 1918.

This 21st day of March, 1918, comes the defendant, Elizabeth Baer, by her attorneys, and files herein and presents to this Court her Petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by her, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $2,500.00, which shall operate as a supersedeas bond.

J. W. THOMPSON, *J.*

145 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA

vs.

CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Assignment of Errors.

Filed Mar. 21, 1918.

The defendant in this action, Elizabeth Baer, in connection with her Petition for a Writ of Error, makes the following assignment of errors, which she avers occurred upon the trial of the cause, to wit:

(I.) The Court erred in the admission of evidence offered by the plaintiff in the following instances, to wit:

(1) In the testimony given by the witness, Samuel O. Wynne, in substance, setting forth his conversation with the defendant, Elizabeth Baer, on September 12th, in the absence of the witness testifying that he had cautioned this defendant that, if she made any statement, she made it with the knowledge that it might be used against her (pages 189 to 191 of the notes of testimony).

(2) In the testimony given by the witness, Samuel O. Wynne, in the introduction in evidence of certain resolutions contained in the minutes of August 13th and 20th, seized upon the premises, 1326 Arch Street, under a search warrant, in substance, as follows: "On August 13th there appeared here in the minutes under the heading 'New Business' the following: "M. and S. that 15,000 leaflets be written or printed on the other side of the leaflet now in use to be mailed to men who have passed exemption boards, also
146 distribution.

"M. and S. Secretary gets bids on price of leaflets."

"On August 20th, under the general secretary's report, it says, 'Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing,' and, under unfinished business was, "M. and S. That Comrade Schenck be authorized to spend $125.00 for sending leaflets through the mail. Carried." (Page 196.)

(3) In the testimony given by the witness, Samuel O. Wynne, in the introduction in evidence of minutes above referred to because they were taken from a loose leaf book. (Page 197).

(4) In the testimony given by the witness, Samuel O. Wynne, in the admission of newspaper clippings found by him in a desk at 1326 Arch Street on August 28, 1917, which, in substance, contained lists of names alleged to be those of persons called in the selective service act (pages 199 and 200).

(5) In the testimony given by the witness, Samuel O. Wynne, in the admission of stacks of circulars found at 1326 Arch Street, alleged, in substance, to be copies of the circular upon which the prosecution of the defendant was based (page 200).

(6) In the testimony given by the witness, Clara Abramowitz, concerning, in substance, the use made of certain newspaper clippings found in a desk at 1326 Arch Street (pages 230 and 231).

(7) In the testimony given by the witness, E. J. Carr, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 237 and 238).

(8) In the testimony given by the witness, Louis M. Passarello, in the offer in evidence of a circular and envelope containing
147 the same addressed to the witness (pages 240 to 242).

(9) In the testimony given by the witness, John Rule, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 244).

(10) In the testimony given by the witness, Robert Anderson, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 245 and 246).

(11) In the testimony given by the witness, Horace F. Banks, in

the offer in evidence of a circular and envelope containing the same addressed to the witness (page 247).

(12) In the testimony given by the witness, Harry J. Kohler, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 249).

(13) In the testimony given by the witness, Frank Henderson, in the offer in evidence of a circular and envelope containing the same addressed to the witness (pages 251 and 252).

(14) In the testimony given by the witness, Howard L. Bill, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 254).

(15) In the testimony given by the witness, Leonard Allen, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 255).

(16) In the testimony given by the witness, Natfianiel O. Gandy, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 257).

(17) In the testimony given by the witness, David Gublebank, in the offer in evidence of a circular and envelope containing the same addressed to the witness (page 259).

148 (II.) The Court erred in refusing to strike out testimony regarding certain resolutions appearing in portions of minutes taken from minute book alleged to have been kept by the defendant, Elizabeth Baer, as secretary, unless the circular, on account of the mailing and distribution of which the defendant was indicted, was connected with this particular resolution (pages 188 and 189).

(III.) The Court erred in overruling the motion on behalf of the defendant that the jury be instructed to find the defendant not guilty (page 273).

(IV.) The Court erred in making the charge to the jury in refusing to state propositions requested by the defendant in the following instances, to wit:

(1) The first point for charge, which was as follows: "Under all the evidence, your verdict should be 'not guilty'." (Page 288).

(2) The fourth point for charge, which was as follows: "If the jury can only determine guilt on the part of the accused from evidence based on books, papers, printing or writing taken from the accused by government officials or agents, then their verdict should be 'not guilty'." (Page 289).

(3) The ninth point for charge, which was as follows: "Under the first Amendment to the Constitution freedom of speech and of the press cannot be abridged, and people can only be held responsible for the results of their utterance. If, therefore, the government has not shown you that any injury was caused to the service of the United States or to the United States as a result of the utterances alleged against these defendants, then your verdict should be 'not guilty'." (Page 292).

(V.) The Court erred in using the following language in 149 the charge to the jury: "You will take into consideration the fact that it was sent out at a time in the exigencies of this war when the United States, along with other nations, is confronted

with a situation which is unparalleled in the history of the world; at a time when young men were being drafted into the service of the United States; that this circular was then sent out, and determine whether, under the evidence, as you have heard it, there was a purpose to send that circular especially to young men who had been accepted in the draft; whether, under those circumstances, and under all the other circumstances of the case, bearing in mind the presumption of innocence, you are satisfied beyond a reasonable doubt that the purpose of this alleged conspiracy, if you believe a conspiracy existed, was to do what is set out in the indictment and what is prohibited by the Act of Congress."

(VI.) The Court erred in refusing to grant a new trial to the defendant.

Wherefore the defendant prays that the judgment of the District Court may be reversed.

HENRY J. GIBBONS,
HENRY JOHN NELSON,
By H. J. G.,
MORRIS HILLQUIT,
By H. J. G.
Attorneys for Defendant.

150 In the District Court of the United States for the Eastern District of Pennsylvania, June Sessions, 1917.

No. 111.

UNITED STATES OF AMERICA
vs.
CHARLES T. SCHENCK, CHARLES SEHL, ELIZABETH BAER, JACOB H. ROOT and WILLIAM J. HIGGINS.

Penal Code: Violation of Espionage Act.

Charge: Conspiracy.

Præcipe as to Transcript of Record.

Filed April 4, 1918.

To the Clerk of the said Court:

The Transcript of Record in connection with the Writ of Error in the above case to the Supreme Court of the United States should contain Docket Entries, Writ of Error, Indictment, Bill of Exceptions, Opinion Refusing New Trial, Judgment, Petition for Writ of Error, Order Allowing Writ of Error, Assignments of Error, Clerk's Certificate, and no others.

HENRY J. GIBBONS,
HENRY JOHN NELSON,
MORRIS HILLQUIT,
Attorneys for Defendants, Charles T. Schenck and Elizabeth Baer.

151 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, George Brodbeck, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of the United States of America vs. Charles T. Schenck, Charles Sehl, Elizabeth Baer, Jacob H. Root and William J. Higgins, No. 111, June Sessions, 1917, as per præcipe filed, a copy of which is hereto attached, the transcript of record in the above entitled case is to include, and now remaining among the Records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 10th day of April in the year of our Lord one thousand, nine hundred and eighteen, and in the one hundred and forty-second year of the Independence of the United States.

[Seal of the District Court of the United States, E. D. Penna.]

GEORGE BRODBECK,
Clerk District Court U. S.

152 [Endorsed:] U. S. District Court, Eastern District of Penna. Certified copy.

Endorsed on cover: File No. 26484. E. Pennsylvania D. C. U. S. Term No. 1017. Charles T. Schenck, plaintiff in error, vs. The United States of America. File No. 26485. Term No. 1018. Elizabeth Baer, plaintiff in error, vs. The United States of America. Filed May 3d, 1918. File Nos. 26484 and 26485.

17

DEC 12 1918

JAMES D. MAHER, CLERK.

BRIEF OF PLAINTIFFS IN ERROR.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. [redacted]437

CHARLES T. SCHENCK, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

No. [redacted]438

ELIZABETH BAER, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

HENRY J. GIBBONS,
HENRY JOHN NELSON,
Attorneys for Plaintiffs in Error,
1011 CHESTNUT STREET, PHILADELPHIA, PA.

FILED DECEMBER 14, 1918.

(26,484) (26,485)

(26,484; 26,485)

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 1017.

Charles T. Schenck, plaintiff in error,

vs.

The United States of America.

No. 1018.

Elizabeth Baer, plaintiff in error,

vs.

The United States of America.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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I. ABSTRACT OF THE CASE.

This is a writ of error made in behalf of the defendants, Charles T. Schenck and Elizabeth Baer, who were found guilty:—

(1) Of conspiracy under Section 4, Title I of the Espionage Act, to violate the provisions of Section 3, to wit, "* * * whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both."

(2) Of conspiracy to commit an offense against the United States—that is, the use of the mails for the transmission of matter (circulars) declared by Section 2, Title XII, of the Act to be non-mailable; and

(3) The use of the mails for the transmission of such matter.

The questions involved are, primarily:—

(1) The Constitutional validity of Section 3, Title I, of the Espionage Act, namely, whether or not it constitutes an abridgement of freedom of speech and the right of petition, in contravention of the First Amendment to the Constitution.

(2) Whether or not the defendants were lawfully found guilty of conspiracy under all the evidence.

(3) Whether or not papers seized under a search warrant were lawfully used as evidence against them under the constitutional provision against unlawful search

(Amendment IV. of the Constitution), and the constitutional provision against a defendant being made to testify against himself (Amendment V. of the Constitution).

The defendants were indicted jointly with three other persons, as above set forth, on September 15, 1917. They were found guilty by a jury on December 20, 1917, the three other persons being found not guilty by the jury under instructions from the trial Judge. The acts alleged against the defendants occurred on August 13-20, 1917, and consisted of mailing and distributing circulars to the public and to men listed in newspapers as being liable under the Selective Draft Act of May 18, 1917. This was before this Court had rendered an opinion declaring the said Draft Act constitutional. The circular referred to is reproduced in the Transcript of Record (pages 4½, 8½, 18½). The acts alleged to have been committed by the defendants and to constitute the crimes charged in the indictment are the same under all counts.

II. SPECIFICATION OF ERRORS.

All of the three questions involved are raised by exceptions to the refusal of the trial Court to affirm points submitted by the defense, which were declined (see page 70 of the Transcript of Record), namely:—

> "1. Under all the evidence, your verdict should be 'not guilty.'
>
> "4. If the jury can only determine guilt on the part of the accused from evidence based on books, papers, printing or writing taken from the accused by government officials or agents, then their verdict should be 'not guilty.'

"9. Under the First Amendment to the Constitution, freedom of speech and of the press cannot be abridged, and people can only be held responsible for the results of their utterance. If, therefore, the Government has not shown you that any injury was caused to the service of the United States or to the United States as a result of the utterances alleged against these defendants, then your verdict should be 'not guilty.' "

III. ARGUMENT.

1. The Constitutionality of Section 3, Title I, of the Espionage Act of June 15th, 1917.

The first amendment to the Constitution reads in part as follows:—

> "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Title I, Section 3, established three new offences: (1) false statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces; (3) obstruction of enlistment and recruiting.

In general, our courts have held that the free speech and free press amendment applies to freedom from interference *before* publication. The Espionage Act only imposes punishment *after* publication. Under this view, following the rule laid down by Blackstone, the Government is prohibited from heading off objectionable discussion through a censorship or the use of injunctions but is not prohibited from punishing an utterance it chooses to consider criminal when once it is spoken or written.

Thus the Government could not (except through the arbitrary act of one of its branches, like the Postoffice)

directly suspend a newspaper which regularly furnished military information to the enemy or censor indecent moving pictures before exhibition.

But such film censorship has been held by this Court (1915) not to infringe freedom of speech; and under the Espionage Act a Federal Judge enjoined the production of "The Spirit of '76" (U. S. *vs.* Motion Picture Film, 252 Fed. 946) a film depicting, *inter alia*, Paul Revere's Ride, because it tended "to make us a little bit slack in our loyalty to Great Britain."

The original rule, therefore, seems to have important exceptions.

But how can a speaker or writer be said to be free to discuss the actions of the Government if twenty years in prison stares him in the face if he makes a mistake and says too much? Severe punishment for sedition will stop political discussion as effectively as censorship.

Censorship had been abolished in England a century befor the adoption of our Constitution; but the Fathers who made the Constitution had experienced fifty successful English prosecutions for libel in the previous thirty years. They knew the meaning of the repudiation of these rules of law by the jury in the trial of the New York printer, Peter Zenger.

When Congress passed the Sedition Law of 1798, punishing "writings against the Government of the United States and the President," Jefferson treated it as unconstitutional. A few years later, Hamilton defended a Federalist editor from prosecution.

In Cooley's Constitutional Limitations, the argument is advanced that the evils to be prevented by the free speech clause are not merely the censorship but any governmental action which may prevent such free and general discussion of public matters as seems essential to prepare the public for an intelligent exercise of their rights as citizens and to subject those in power to scrutiny and condemnation.

The spread of truth in matters of general concern is essential to the stability of a republic. How can truth sur-

vive if force is to be used, possibly on the wrong side? Absolutely unlimited discussion is the only means by which to make sure that "truth is mighty and will prevail."

This does not mean a man may with impunity violate the Draft Law by refusing to do military service when so required; but it does mean he can say the Draft Law is wrong and ought to be repealed. Some of our judges have made this distinction; while others virtually make all opposition to the war criminal.

It can be even urged farther that the right of free speech, if it is allowed fully, gives the right to persuade another to violate a law, since, legally, it is only the one who actually violates the law who should be punished. It is no excuse for a thief to say John Jones persuaded him to steal; or, as the homely adage has it, "you don't have to put your hand into the fire because I tell you to do so."

This is the distinction between words and acts.

To illustrate the wide divergence of judicial views under the Espionage Act:—

Judge Hand in the "Masses" case (U S. *vs.* Eastman, 252 Fed. 232), says:—

> "Political agitation * * * may in fact stimulate men to violation of law. * * * Yet to assimilate agitation * * * with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation, which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge but a hard-bought acquisition in the fight for freedom."

On the other hand, Judge Van Valkenburgh, in the trial of Rose Pastor Stokes (U. S. *vs.* Stokes, West. Dist. Mo., May, 1918), says that her letter to a newspaper in which she said, "I am for the people, while the government is for the profiteers," might interfere with the operation of the military forces, because it might dampen the spirits of the newspaper subscribers and "our armies in the field can succeed only so far as they are supported by the folks at home."

If all opponents of a war are suppressed and all advocates of a war are given free rein, is it not conceivable that a peace-loving president might be prevented from making an early, honorable peace, founded on justice! How can the citizens find out whether a war is just or unjust unless there is free and full discussion! If it is criminal to say the Draft Law is wrong, then it is criminal to say that any law is wrong, for the Constitution, we are told, is not suspended in time of war; but we dare not *attack* it or our form of government. It is conceivable, under such a rule, that a citizen might be a criminal who advocated the election of senators by popular vote, the adoption of the referendum, or what not; but probably such would only be the case in time of war when he might thereby give aid and comfort to the enemy.

Must we return to conditions which prevailed under George III and be punished for criticizing our Government?

The Espionage Act breaks with the precedents of English and American law. The Sedition Act of 1798 wrecked the Federalist Party. Lincoln was big enough to stop his generals from suppressing a *disloyal press*. England, in the past, has been big enough to allow her citizens to criticise her official acts in war. Are we Americans big enough to allow honest criticism of the majority by the minority! In days gone by it was held criminal to talk against flogging in the army; nowadays it is generally considered criminal to talk against Wall Street.

Revolutions are not caused by freedom of expression.

Up to June of this year the Department of Justice announced a total of nearly twelve hundred cases under the Espionage Act, with one hundred and twenty-five convictions and six hundred and seventy-two cases pending.

Let us look at some of the cases.

In U. S. *vs.* Groeschl (Dist. of Ky., Nov. 1917), the defendant was indicted under the Espionage Act for distributing a leaflet among employees of a meat-packing house. It read as follows:—

"A WORD TO THE PEOPLE, THE MEN AND THE WOMEN OF LOUISVILLE AND OF THE WHOLE COUNTRY AND ALL OTHER COUNTRIES, FOR THAT MATTER.

"We should allow all those enthusiastic patriots and patriotic enthusiasts, who are so willing, so eager and so anxious,' to 'serve their country,' to sacrifice their all, and who want war so bad and go to war so bad, and who want to fight, shoot, stab, kill and be killed, we should allow them *to go to war,* to the very front of it, where the fighting is the thickest and the hottest and let them fight, shoot, stab, kill and be killed to their heart's content. But they should let other decent, honest, sincere, sensible, reasonable, fair-minded people *alone,* people who believe in 'live and let live,' and in settling individual, national and international disputes and troubles by appealing *to reason, truth, justice, liberty and humanity, and not in resorting to brute force, to bayonets and bullets, to guns, bombs and cannons and the destruction of millions of irreparable human lives and billions worth of precious property Think this over."*

The prosecution urged conviction on the ground that possibly the leaflet in question might find its way into the hands of soldiers. Judge Evans of the United States District Court for the Western District of Kentucky held the defendant did not come within the Act and instructed the jury to find him not guilty.

This case is similar to the one at bar, except that in the case at bar the leaflet consists largely of quotations from the Constitution and of words used by Congressmen in the debate over the Draft Act. Also, in the case at bar it was not a question as to whether or not the leaflet might come into the hands of soldiers. It did come into their hands and into the hands of men who had been drafted, and it was mailed to them.

In United States *vs.* Hall, 248 Fed. 150, the defendant

was charged (1) with making and conveying false reports with intent to interfere with the operations and success of the military forces and to promote the success of enemies, and (2) with causing and attempting to cause insubordination in the military forces and obstructing recruiting to the injury of the United States.

Specific acts were charged against him as follows:—

> "At divers times in the presence of sundry persons, some of whom had registered for the draft, defendant declared that he would flee to avoid going to war, that Germany would whip the United States, and he hoped so, that the President was a Wall Street tool, using the United States forces in the war because he was a British tool, that the President was the crookedest—ever President, that he was the richest man in the United States, that the President brought us into the war by British dictation, that Germany had right to sink ships and kill Americans without warning, and that the United States was only fighting for Wall Street millionaires and to protect Morgan's interest in England."

Defendant made the declarations in Montana at a village of some sixty people, sixty miles from a railway, and none of the armies or navies within hundreds of miles. They were oral, some in badinage with the landlady in a hotel kitchen, some at a picinic, some in the street and some in hot and furious saloon arguments.

Judge Bourquin said:—

> "The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts wilfully put forward as true and broadly, with the specific intent to interfere with army or navy operations. The more or less public impression that for any slanderous or disloyal remark the utterer can be prosecuted by the United States is a mistake."

"Military and naval forces in the Espionage Act means the same as in the declarations of war, the ordinary meaning, viz: those organized and in service—not persons merely registered and subject to future organization and service."

"The evidence would justify a finding that defendant did so make the declarations charged. But it would not support a verdict of guilty of any of the crimes charged."

"To sustain the charge, actual obstruction and injury must be proven, not mere attempts to obstruct. The Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service."

In United States *vs.* Zimmerman (Dist. of Ind., March 19, 1918, Anderson, D. J.), the Judge said:—

"Are we, notwithstanding we are at war, not permitted to speak? I still think that a man has a right to speak freely, and that means he has a right to speak foolishly as well as wisely. If we are going to limit the right of free speech to people who talk wisely, there would probably be dead silence all around. * * * It is not enough that he (the defendant) wilfully obstructs the recruiting or enlistment service. It has got to be to the injury of the service of the United States. So that, in order to come within this statute, you will have to show, just as they did in the Milwaukee case, that somebody who would otherwise have entered the service was induced not to, because otherwise there would be no injury."

The defendant was charged, *inter alia*, with criticising the Root Commission, with asserting that loyal citizens should withdraw from the war and with alleging that Great Britain was not doing her share, etc. The jury was instructed to return a verdict of not guilty.

In United States *vs.* Eastman (Masses Publishing Co., *et al.*) 252 Fed. 232, the defendants were indicted on the charge of conspiracy (1) to cause insubordination, etc., in the military forces, and (2) to obstruct the recruiting and enlistment service. The first count was dismissed on motion, because the indictment did not allege any intended action which would have effected the alleged forbidden intent. The trial on the second count resulted in a disagreement.

Judge Hand said:—

> "* * * Every man has the right to have such economic, philosophic or religious opinions as seem to him best, whether they be socialistic, anarchistic or atheistic.
>
> "Each defendant has the constitutional right of freedom of speech also, unless he violates the express law, which he is accused of violating, no matter how ill-timed, unsuited to your sense of propriety or morally wrong his opinions, utterances or writings may be. * * *
>
> "Every citizen has a right, without intent to obstruct the recruiting or enlistment service, to think, feel, and express disapproval or abhorrence of any law or policy or proposed law or policy, including the Declaration of War, the Conscription Act, and the so-called sedition clauses of the Espionage Act; belief that the war is not or was not a war for democracy; belief that our participation in it was forced or induced by powers with selfish interests to be served thereby; belief that our participation was against the will of the majority of the citizens or voters of the country; belief that the self-sacrifice of persons who elect to suffer for freedom of conscience is admirable; belief that war is horrible; belief that the Allies' war aims were or are selfish and undemocratic; belief that the Hon. Elihu Root is hostile to socialism, and that his selection to represent America in a socialistic republic was ill-advised.

"It is the constitutional right of every citizen to express his opinion about the war or the participation of the United States in it; about the desirability of peace; about the merits or demerits of the system of conscription, and about the moral rights or claims of conscientious objectors to be exempt from conscription. It is the constitutional right of the citizen to express such opinions, even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment. * * *"

"If it was the conscious purpose of the defendants to state truth as they saw it; to do this clearly and persuasively in order to lead others to see things in the same way, with the object to bring about modification, reconstruction or reshaping of national policy in accordance with what they believed right and true, and obstruction of the recruiting and enlistment service was not their object, the jury cannot find them guilty. * * *"

In United States *vs.* Olivereau (Dist. of Wash.), the indictment included counts alleging the commission of the second and third offences defined in Section 3 of the Espionage Act, and also the mailing of matter urging treason, insurrection or forcible resistance to law.

Judge Neterer said:—

"All persons are free to express their views on all public questions so long as they are actuated by honest purposes, and not for the purpose of obstructing the execution of the laws of the United States * * * A person may say or do anything not in itself unlawful to prevent the passage of a law, or to secure the repeal of one already passed, but after the law is passed it is every person's duty to conform his *acts* * * * and a person may not, for the purpose of creating senti-

ment against the wisdom of the law, *do* anything with intent to procure a violation of the law."

In United States *vs.* Ramp, Judge Wolverton said:—

> "A citizen is entitled to fairly criticize men and measures * * * this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed or to which he is subjected. But when his criticism extends, or leads by wilful intent, to the incitement of disorder or riot, or to the infraction of the laws * * * it overleaps the bounds of all reasonable liberty accorded to him by the guaranty of freedom of speech, and this because the very means adopted is an unlawful exercise of his privilege."

As result of an examination of the foregoing cases, it would seem that the fair test of protection by the constitutional guarantee of free speech is whether an expression is made with sincere purpose to communicate honest opinion or belief, or whether it masks a primary intent to incite to forbidden action, or whether it does, in fact, incite to forbidden action.

Let us look, then, at the circular (pages 4½, 8½, 18½, Transcript of Record), the distribution of which through the mails and otherwise was the basis of the prosecution in the case at bar. It was printed on two sides. The heading on one side was: "Assert Your Rights," and on the other side, "Long Live the Constitution of the United States. Wake up, America! Your Liberties Are In Danger!" The unconstitutionality and foolishness of conscription were asserted and people were called upon to assert their constitutional rights.

Both sides of the circular consist largely of quotations from and references to the Constitution. There was no attempt to hide the source of the circular. In fact, readers were urged to go to the Socialist Party Headquarters, 1326 Arch Street, Philadelphia, and *sign a petition to repeal*

the Conscription Act. The worst that could be charged against the circular was that it said "A conscript is little better than a convict," and these, according to the Congressional Record, were the exact words used by Mr. Champ Clark in a speech in Congress.

2. WERE THE DEFENDANTS GUILTY OF CONSPIRACY?

The alleged overt acts of defendants are charged in the indictment in the following language (page 6, Transcript of Record):—

> "1. On, to wit: August 13th, 1917, at Philadelphia aforesaid, the said defendants, *as members of the Executive Committee of the Socialist Party,* did, at a meeting of the said committee adopt a resolution of the following nature, to wit:
>
> "'M. and S. 15,000 leaflets to be written to be printed on the other side of leaflet—now in use—to be mailed to men who have passed the exemption board, also distribution.
>
> "'M. and S. Secretary get bids in price of leaflets.'
>
> "2. On, to wit: August 20th, 1917, at Philadelphia aforesaid, at a further meeting of the said Executive Committee the said defendants *did join in approving the minutes* of the aforesaid meeting held August 13th, 1917, wherein the resolution aforesaid was set forth as moved and seconded and did provide for the taking of certain action *in furtherance of the aforesaid resolution,* to wit:
>
> "'M. and S. that Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried.'
>
> "3. On, or to wit: August 16th, 1917, at Philadelphia aforesaid, the said Charles J. Schenck, *pursuant to the said resolution of August 13th, 1917, did direct* the printing of the circular aforesaid, and did direct the purchase of stamped envelopes for the purpose of distributing the said circulars through the mails.

"4. On, to wit: August 18th, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises at 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia.

"5. On, to wit: August 20th, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia, and for the purpose of having the said circulars mailed to men who had been called and accepted for military service."

A large number of witnesses were called by the Government at the trial of the cause, but all the evidence tending to establish the guilt of the defendants may be fairly summarized as follows:—

The Government proved through the witness Samuel O. Wynne, a postoffice inspector, over the defendants' objections, that the defendant Elizabeth Baer admitted that certain papers written in longhand (and also typewritten), were in her handwriting (Transcript of Record, page 14). The said papers were thereupon admitted in evidence over the defendants' objections (Transcript of Record, page 18). The witness had previously testified that the defendant Schenck had identified the said papers as the minutes of the executive committee of the Socialist Party (Transcript of Record, page 13).

Reading from the minutes, the said witness testified as follows:—

"A. On August 13th there appeared here in the minutes under the heading 'New Business' the following:

"'M. and S. that 15,000 leaflets be written or printed on the other side of the leaflet now in use to be mailed to men who have passed exemption boards, also distribution.

"'M. and S. Secretary gets bids on price of leaflets.'

"On August 20th, under the general secretary's report, it says, 'Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing,' and, under unfinished business was, 'M. and S. That Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried.'" (Transcript of Record, pages 18-19.)

It was further shown that the defendant Schenck had ordered a quantity of leaflets (15,000 to 16,000) printed by the "Jewish World." The said leaflets are the leaflets set out in the indictment, entitled as aforesaid, on one page:—

"Long Live the Constitution of the United States"

and on the other page:—

"Assert Your Rights"

A quantity of such leaflets were found in the headquarters of the Socialist Party, 1326 Arch Street, in the City of Philadelphia, which said office was in charge of the defendant Schenck, who was in charge of such headquarters as the general secretary of the Socialist Party (Transcript of Record, page 13). The said circulars were piled up on a table, and the defendant Schenck stated to the witness Wynne, as was also testified by the witness Clara Abramowitz, that they were there for free distribution so that anybody who wanted them could come into headquarters and receive them (Transcript of Record, pages 13, 35).

A number of newspaper clippings containing lists of names and addresses said to be those of persons drafted

into the army under the provisions of the Selective Draft Act, were also found at the said headquarters of the Socialist Party at 1326 Arch Street, and it was shown that a number of the said leaflets or circulars were sent through the mails to persons so drafted into the army.

At the close of the Government's case the defendants moved for a direction of acquittal on the ground that no case had been made out against them. The Government thereupon withdrew the prosecution against the defendants Charles Sehl, Jacob H. Root and William J. Higgins, and the Court denied the defendants' motion as against Elizabeth Baer and Charles T. Schenck. An exception was duly taken by the said defendants to the denial of the said motion (Transcript of Record, page 60).

The jury returned a verdict of guilty against the said two defendants.

The defendants contend that the said verdict should be set aside against them on the ground that it is contrary to law and devoid of any evidence to sustain it.

For the purposes of this argument, and for such purposes only, the defendants assume that the character of the leaflet or circular offered in evidence herein is such that it may present a question for the jury whether an agreement to circulate the same among men engaged in the military forces of the United States would constitute a conspiracy to wilfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty under the provisions of the Act of June 15th, 1917.

As to Defendant Elizabeth Baer.

The sole testimony against her is that she wrote the minutes of the meeting of the Executive Committee of the Socialist Party dated respectively August 13th and 20th, 1917. The said minutes were admitted in evidence against her upon the said testimony.

There is absolutely no further proof of any kind to connect the said defendant Elizabeth Baer with the alleged conspiracy. No attempt was made to show that she ever saw

or read the leaflets before or after the printing thereof, or that she had any part in the circulation, distribution or mailing of the same. *There is even no proof that the leaflets found in the Socialist Party headquarters and circulated through the mails were the identical leaflets authorized to be printed, distributed and mailed by the Executive Committee of the Socialist Party.*

There is furthermore not a scintilla of evidence to show that the defendant Elizabeth Baer was a member of the said Executive Committee. The testimony against her comes exclusively from the witness Samuel O. Wynne and is as follows:—

> "A little later, about September 12th, I called on Dr. Baer, who is one of the defendants now, although she was not at that time, in her office, at 129 South Eighteenth Street, I believe, in this city, and I told Dr. Baer who I was and my official position and showed her my commission. I had with me at that time the minutes which were taken out of this book of the meetings of August 20th and August 13th, and those four pages which are the typewritten minutes and also the longhand minutes of the same meeting. I had those with me. I told Dr. Baer that I would like to ask her about these minutes, and she looked at them and *said these were hers.*" (Transcript of Record, page 14.)

And again:—

> "Dr. Baer looked at these two longhand sheets and said that was her handwriting of the minutes of these two meetings, and the four typewritten pages I had were the minutes of the same meeting. I asked her who were on the Executive Committee of the Socialist Party, and she said before she answered she would like to call up her attorney to get his advice about answering, and I told her, 'All right,' and she called up some one on the telephone and called him Mr. Nelson,

> and she told this party on the telephone that Mr. Wynne of the Postoffice Department was there and had the minutes of the meetings of August 20th and August 13th and wanted her to tell him as to who were on the Executive Committee, and who made certain motions. She hung up the receiver and then said her attorney advised her not to talk to me. I told her that was perfectly all right, that she should be guided by whatever her attorney told her, and I wasn't there, I suppose, over five or ten minutes." (Transcript of Record, page 15.)

That was all.

There is nothing in the minutes so offered in evidence or in any other testimony in the case to show who were the members of the Executive Committee and who of them were present at the meetings of August 13th and 20th. The mere fact that the defendant Elizabeth Baer kept the minutes of the meeting falls, of course, very short from proof that she was a member of the Executive Committee. She might have been employed to keep the minutes as secretary, stenographer or otherwise. But a still more fatal objection to the verdict against the defendant Baer is the absolute lack of proof that she voted in favor of the resolutions set forth in the minutes of the meetings of August 13th and 20th, or approved of such resolutions or participated in the deliberations and decisions of the Executive Committee in any way.

A conspiracy is a criminal *agreement* on the part of the defendants and a conviction of such conspiracy can only be sustained against each of the defendants upon positive proof beyond a reasonable doubt of his or her actual participation in such conspiracy, but the utmost that the testimony would warrant the jury in finding against the defendant Baer is that she had mere knowledge of the alleged conspiracy. This, the courts have uniformly held, is entirely insufficient to sustain a conviction of conspiracy.

In the case of McClarty *vs.* U. S. (191 Fed. Rep. 518) the Court said:—

"Imputation to one person of the acts of another can not in criminal cases find adequate basis in mere moral or argumentative considerations. Criminally a man can only be held responsible for what he does or actually procures to be done."

And again:—

"A mere failure on the part of the conspirator to prevent another from doing the act of his own volition cannot be sufficient (to establish a conspiracy on his part) unless we disregard clearly established canons of statutory interpretation."

In the case of Marrash *vs.* U. S. (168 Fed. Rep. 225) the Court expressed the doctrine in the following language:—

"We are unable to find sufficient evidence against Habib Marrash. There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which rises to the dignity of proof required in criminal cases. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough."

In the case of Patterson *vs.* U. S. (222 Fed. Rep. 599, at page 631) it was said by the Court:—

"It is not sufficient to connect any officer or agent of the company with the conspiracy that they knew of it or acquiesced in it. *They must by word or deed have become a party to it.*"

And likewise in the case of U. S. *vs.* Newton (52 Fed. Rep. 275):—

"Proof of mere suspicion, or bare knowledge, that the act is being done by others, without such inten-

tional participancy in or connection with it, is not sufficient * * * mere knowledge, without more * * * would not make the person a party to the acts."

And this doctrine has been followed in the State Courts as well as in the Federal Courts.

In the case of Commonwealth *vs.* Tilly (33 Pa. Super. 35), a prosecution for conspiracy was based upon the collective wrongful acts of a school board, all of the members of which were convicted for such conspiracy. In setting aside the verdict against such members of the board as had not been shown to have actively and knowingly participated in the wrongful act, the Court held that where certain members of the board were shown to be guilty of conspiracy, other members can not be convicted of the same offense merely because they were members of the board but that "it must be shown affirmatively that such members participated with the others in the criminal confederation."

How much stronger is the case of Elizabeth Baer who was not even shown to be a member of the Executive Committee of the Socialist Party?

As to the Defendant Charles T. Schenck.

The proof of conspiracy against the defendant Schenck is predicated solely and exclusively upon his alleged cooperation and confederacy with the Executive Committee of the Socialist Party in drafting, printing, circulating, distributing and mailing the leaflets or circular above described. The indictment charges the defendants, including the defendant Schenck with having committed the said acts "as members of the Executive Committee of the Socialist Party" and "in furtherance of the aforesaid resolutions" (contained in the minutes of the meetings of August 13th and 20th), and again "pursuant to the said resolution of August 13th, 1917;" and the theory of the Government throughout the trial rested solely upon the alleged connection between the alleged resolutions of the said Executive Committee and the alleged acts of the defendant Schenck.

The Court's denial of the motion to acquit the said defendant Schenck was likewise based upon the theory that there was proof in the case of such co-operation or confederacy between the Executive Committee of the Socialist Party and the defendant Schenck. The alleged crime of which the defendant Schenck was found guilty by the jury is the crime of conspiracy which is inevitably predicated upon the acts and criminal co-operation of at least two persons. One person cannot conspire with himself. The conviction against the defendant Schenck can not stand unless a criminal agreement between him and the Executive Committee of the Socialist Party was shown.

If we eliminate the alleged minutes of the Executive Committee of August 13th and 20th from the testimony in this case, the only proof against the defendant Schenck remains that he ordered the incriminating leaflet or circular and that he kept quantities of the same in his office available for use by any persons who might ask for the same. This in itself might or might not involve a direct and personal violation of some provisions of the Espionage Law but it could not possibly support a conviction of the crime of conspiracy.

The question then with reference to the defendant Schenck resolves itself to this: Is there in the testimony herein any legal, admissible proof of any agreement, understanding, co-operation or connection between him and the Executive Committee of the Socialist Party in the drafting printing, circulating, distributing or mailing of the said leaflets or circulars.

Counsel contends that there is no such proof.

As shown above, there is nothing to indicate that the circulars caused to be printed by the defendant Schenck were the circulars referred to in the minutes of the Executive Committee of the Socialist Party.

But even a weightier objection is that the alleged minutes of the said meetings of the Executive Committee of August 13th and 20th, if admissible at all, were only admissible against the defendant Elizabeth Baer and not as against the defendant Schenck, and that as far as he is concerned they

could not be considered by the jury. They were non-existent as to him.

The rule of law is clearly established that while the act of one conspirator in the prosecution of the enterprise is, *after independent proof of the conspiracy*, evidence against all of the conspirators, his admissions as to the existence of the conspiracy itself, are inadmissible in evidence against his alleged co-conspirators.

Fain *vs.* U. S., 209 Fed. Rep. 525, at page 534;
Logan *vs.* U. S., 144 U. S. 263;
Brown *vs.* U. S., 150 U. S. 93.

In a criminal prosecution acts and declarations of one conspirator made in the absence and beyond the hearing of an alleged co-conspirator, are not admissible against the latter, particularly after the accomplishment of the conspiracy (Commonwealth *vs.* Zuern, 16 Pa. Super. 588), or at least until the existence of the conspiracy has been shown by testimony independent of such acts and declarations of a co-conspirator (People *vs.* Kelly, 64 Pac. 1091).

In this case the alleged admission of defendant Elizabeth Baer cannot be claimed to have been an act done or declaration made in pursuance and as part of the alleged conspiracy. It was clearly an admission of the conspiracy itself. It was made after the alleged conspiracy had been fully accomplished. It was made in the absence and beyond the hearing of the defendant Schenck, and there was no other proof of the alleged conspiracy except the declaration of the defendant Baer.

Under the circumstances the alleged admission of the defendant Elizabeth Baer was clearly inadmissible against the defendant Schenck and as far as he is concerned there is no proof of any resolution passed by the Executive Committee of the Socialist Party authorizing or directing the publication or distribution of any leaflet or circular.

The defendant Schenck even if shown guilty of wrongdoing, is thus left without any confederates as far as the legal evidence in the case shows and as was said in the case of U. S. *vs.* Newton (*supra*):—

"One person cannot constitute a conspiracy. If every part of the acts charged in the indictment had been done by the defendant alone, and without any other person having combined with him in any arrangement or agreement with reference thereto, * * * then there would be in law no conspiracy."

The defendants assert the following incontrovertible propositions:—

1. That the defendants herein were found guilty of the crime of conspiracy and not of direct individual violations of the Espionage law.

2. That the alleged conspiracy was one formed by the Executive Committee of the Socialist party of the City of Philadelphia, and that such conspiracy had for its object the printing, mailing and distribution of a certain circular among persons in the military service of the United States. This was the sole theory upon which the indictment was drawn and the case tried and submitted to the jury. No other conspiracy was either charged or attempted to be established upon the trial, nor could any other conspiracy be spelled out from the evidence.

3. The only proof of such alleged conspiracy offered upon the trial was that contained in the resolutions alleged to have been adopted by the Executive Committee of the Socialist party on August 13th and 20th. The charge of the alleged conspiracy must stand or fall by the proof of these resolutions.

Upon these simple propositions the defendants contend:—

As to the Defendant Charles T. Schenck.

That the alleged resolutions were not admissible as against him upon the admission of his co-defendant Elizabeth Baer, and that there was no other competent testimony of the adoption of the said alleged resolutions.

As to the defendant Schenck therefore, the record is absolutely devoid of any proof of conspiracy. The fact that he ordered and had in his possession the incriminating circulars and permitted them to be distributed, and that he had in his possession lists of names of drafted men, does not cure the fatal defect. All these elements become relevant only as proof of overt acts after the alleged conspiracy has been independently established. No attempt was made upon the trial to establish a conspiracy between the defendant Schenck, the witness Clara Abramowitz or any of the persons who distributed the circular. If Schenck participated in any conspiracy, it must have been in the alleged conspiracy of the Executive Committee or not at all, and we repeat as to the defendant Schenck, there is not a scintilla of competent evidence to prove the existence of such a conspiracy. There is also no strength in the contention of the prosecution that the conviction may be upheld under the third count of the indictment, charging the defendants with unlawfully using and attempting to use the mails and postal service of the United States, because the record is barren of any proof that the defendant Schenck mailed or attempted to mail a single one of such circulars. The alleged appropriation of One hundred twenty-five dollars ($125) for such purpose by the Executive Committee of the Socialist party is not any evidence against the defendant Schenck, since the resolution to that effect was not admissible as against him.

As to the Defendant Elizabeth Baer.

There is an absolute failure of proof that she assented to, or voted for the alleged resolutions of the Executive Committee of the Socialist Party, or that she did anything or committed any acts in furtherance of the objects of the said resolutions. The utmost that can be claimed against her, perhaps and inferentially, is that she was present at the meetings at which the said resolutions were adopted. Even under the contention of the Government, that is by far

not enough, to charge her with active participation in a criminal conspiracy.

3. CONSTITUTIONALITY OF SEARCH WARRANT AND OF USE OF EVIDENCE SO OBTAINED.

The fourth amendment to the Constitution reads:—

> "The right of the people to be secure * * * against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath * * * and particularly describing the place to be searched and the persons or things to be seized."

The fifth amendment to the Constitution reads:—

> "No person shall be * * * compelled in any criminal case to be a witness against himself. * * *"

In U. S. *vs.* Tureaud, 20 Fed. 621, 623, it was said:—

> "The rule which was established was that the warrant should issue only upon probable cause, supported by oath or affirmation of the person making the charge, in which should be stated the facts within his own knowledge, constituting the grounds of such belief or suspicion. The probable cause supported by oath or affirmation prescribed by the fundamental law of the United States, is, then the oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense. It does not appear, from the affidavit upon which these procedures are based, that the affiant has any knowledge whatever of the truth of the matters contained in the informations; but simply that 'all the statements and averments are true as he verily believes, *i. e.*, that he believes them all to be true without any showing as to the grounds of the belief."

In the matter of a Rule of Court, 3 Woods (U. S.) 502, Bradley, C. J., said:—

> "One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others, whose names are not disclosed, swears that upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. * * * In view of these considerations * * * No warrant shall be issued by any commissioner of this Court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

The affidavit on which the search warrant was issued in this case bears out the testimony of Postoffice Inspector Wynne (page 12, Transcript of Record):—

> "Q. During August of this year did you receive a complaint concerning the mailing of a particular circular?
>
> "A. Yes, on August 27th, of this—we received a number of complaints of people who mailed their complaints in, addressed to the Postoffice Inspector, and other people came in in person and brought their letters that they had received through the mails and the letter contained a circular which I have here and they complained as to the receipt of it."
>
> * * * * * * *
>
> "Q. What did you do after you received that circular?
>
> "A. The same time, or about the same time, on the same day, I also received complaint from various postoffice station superintendents in Philadelphia that a

great number of these letters were being mailed through their station. I directed them to hold the letters from mailing and send them into my office, and I received that pack of letters there, and there are some six hundred of them, I think, as I counted them."

(Page 13, Transcript of Record):—

"Q. Then what was your next action?

"A. The matter was then submitted to the United States Atorney and by his direction, a search warrant was issued for the headquarters of the Socialist Party at 1326 Arch Street as it appeared on this circular."

He said he had reason to believe, and did believe, that there had been a violation of the Act of June 15th, 1917, to wit, Section 3 of Title XII of the Espionage Act, but he failed to show how it was he got his belief and why he did believe. It is true he mentioned this specific place, 1326 Arch Street, and asked for a search warrant specifically for mailing lists, circulars, letters, books and papers; but no mention was made of any particular person who gave him the information, or when and where he got the information or how he got it.

Chief Justice Marshall, in *ex parte* Bollman, 4 Cranch (U. S.) 75, says, on page 130:—

"This probable cause therefore ought to be proved by testimony, in itself illegal, and which, though from the nature of the case it must be *ex parte* ought in most other respects to be such as a court and jury might hear."

In U. S. *vs.* Sapinkow, 90 Fed. 654, 660 (C. C. N. Y.), it was stated:—

"As his affidavit stands, the deponent has stated on information and belief that the defendant was guilty of various acts and omissions, but he fails utterly to give the slightest substantiations of such information and belief or either."

Conviction obtained by evidence obtained in an illegal search and seizure is illegal:

Weeks *vs.* U. S., 232 U. S. 383;
Flagg *vs.* U. S., 233 Fed. 481 (C. C. A. 2d Cir. and authorities there cited).

Although the Constitution says that no person shall be compelled in any criminal case to be a witness against himself, it seems that judicial decision has modified the exact words of the Constitution to mean that no person shall be compelled in a criminal case to be a witness against himself, provided his testimony is verbal. If, however, he should be unfortunate enough to write something or save some printed matter, the rule no longer holds; and he can be convicted out of his own mouth, just as if the Constitution never said anything about the matter.

There is no doubt that the cases show that the general rule is that evidence obtained by means of a search warrant is not inadmissible, either on the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself. The courts seem only to modify the rule in the case of unreasonable search or seizure.

U. S. *vs.* Wong Quong Nong, 94 Fed. 832.

Some of the cases seem to hold that it is an unreasonable search if a defendant's *private* papers are taken. Others seem to hold that it is an unreasonable search if papers are taken from the defendant's *personal* possession. But it strikes counsel for the defendants in the case at bar that no scientific difference can be made between a person's private papers and other papers and between papers in a defendant's personal possession and otherwise possessed. In theory, at least, the defendants maintain that the Constitution was intended, in this respect, to prevent a prosecutor from making a defendant testify against himself, whether by verbal, written, printed or other testimony.

Looking at the case at bar from all points of view, the

defendants contend that they are not criminals in the ordinary sense of the word. This is no question of moral turpitude. This is a political question. No matter what the law may be, no matter what even this high Court may decide, there is a question here of human freedom which will not down in spite of what the laws may say or what the laws may be.

Even this high Court, one of the greatest in the civilized world, has changed its opinion on political subjects and changed its opinion with regard to the meaning of laws passed by the Legislature, always holding, however, that it construed the laws of the Legislature as to their meaning and constitutionality.

Martyrs are not always right. Conscientious objectors are sometimes wiped out and their opinions are entirely lost in the progress of humanity. But it remains a fact, nevertheless, that no government and no court and no law can easily afford to take issue with the smallest minority of citizens, if they are not hypocrites and if they are not seeking self-aggrandizement, but are steadfastly standing for what they honestly, conscientiously believe, and pointing to the history of the past to show that the trend of events is in their favor.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CHARLES T. SCHENCK, PLAINTIFF in error, *v.* THE UNITED STATES OF AMERICA. } No. 437.

ELIZABETH BAER, PLAINTIFF IN error, *v.* THE UNITED STATES OF AMERICA. } No. 438.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Selective Service Act was passed on May 18, 1917. The registration of persons subject to the draft took place in accordance with the proclamation of the President on June 5, 1917. The Selective Service regulations were promulgated by the President on June 30, 1917, and between that date and the dates of the events hereinafter described the draft boards had been organized, the order in which registrants were to be called for examination and exemption or induction had been determined by lots drawn at Washington, and, in Philadelphia as

elsewhere throughout the country, some of the registrants had been called before the boards, examined and accepted, rejected, or exempted. In Philadelphia, as elsewhere throughout the country, there appeared from day to day in the daily papers the names of those registrants who had been thus called, examined, and accepted.

The plaintiff in error, Charles T. Schenck (hereinafter called defendant), was general secretary of the Socialist Party of Philadelphia and in charge of its headquarters at 1326 Arch Street in that city. The plaintiff in error, Elizabeth Baer (hereinafter called defendant), was the recording secretary of the party, and, as shown by the defendant's own witness, was a member of its executive committee (R. 13, 38, 62). On August 13, 1917, the executive committee adopted the following resolutions:

> M. and S. That 15,000 leaflets be written to be printed on the leaflet now in use to be mailed to men who have passed exemption boards, also distribution.
>
> M. and S. Secretary gets bids on price of leaflets. (R. 18.)

Shortly thereafter one Lazar went to the printing shop of a newspaper entitled the "Jewish World," for which he was soliciting business (R. 22), and secured a quotation on 15,000 to 16,000 circulars (R. 24; see also R. 13), of the size and general type proposed to be sent out in pursuance of the foregoing resolutions. The next day Lazar and the defendant Schenck went to this printing office and the latter left the copy for the circular (R. 24). The minutes of the August 20,

1917, meeting of the said executive committee under the head of "General Secretary's report," contain the entry:

> Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing same.

At the same meeting, under the head of "Unfinished business," the following resolution was adopted:

> M. and S. That Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried. (R. 19.)

The minute book in which these entries were found was identified by Schenck (R. 13), after having been warned that anything he might say would be used against him (R. 28), and both the original minutes of the meeting in longhand and the typewritten copies thereof were identified by Dr. Baer as having been written by her (R. 14, 15). On August 28 Federal officers went to the headquarters with a search warrant and with a warrant for Schenck's arrest (R. 28) and seized, among other things, the minute book, bundles of the circulars, and many newspaper clippings containing lists of the names and addresses of men who had been accepted for military service by the draft boards (R. 13, 18).

The circular consisted of a leaflet printed on both sides, a facsimile of which appears in the record (R. 6, 8, 18).

One side of the leaflet is entitled "Long Live the Constitution of the United States. Wake Up, Amer-

ica. Your Liberties Are in Danger." A few quotations from this portion of the circular follow:

> A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a freeman. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.
>
> Are you one who is opposed to war, and were you misled by the venal capitalist newspapers or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?
>
> Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do

you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the conscription act.

The reverse side of the circular is headed "Assert Your Rights." This contained the following passages:

The Socialist Party says that any individual or officers of the law intrusted with the administration of conscription regulations violate the provisions of the United States Constitution, the supreme law of the land, when they refuse to recognize your right to assert your opposition to the draft.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. You are a citizen; not a subject! You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants; not your masters. Their wages comes from the expenses of government which you pay. Will you allow them to unjustly rule you?

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper"?

Will you be lead astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy can not be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

You are responsible. You must do your share to maintain, support, and uphold the rights of the people of this country.

> In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

The one side had been printed several months before and some of the circulars so printed had been distributed at that time (R. 61).

At the headquarters there were kept on hand and given away to those who came for them stamped envelopes together with the circulars. A young lady named Clara Abramowitz was in charge of the book shop of the headquarters, and, in pursuance of defendant Schenck's directions, gave the circulars to all who called and asked for them (R. 62). Some of these callers asked for stamped envelopes in which to mail the circular, and Miss Abramowitz, as directed by Schenck, gave them the stamped envelopes which were on hand for that purpose (R. 35). Many hundreds had been mailed, some of which reached the addresses and others were held up by the postal authorities (R. 12, 57, 58). Ten men, registrants under the Selective Service Law who had been examined and accepted by the draft boards appeared at the trial and testified (R. 40, 41, 43, 44, 45, 47, 49, 50, 51, 52). Some had received these circulars through the mails; others opened, while on the witness stand, envelopes addressed to them which had been taken from a bundle of about 610 envelopes (R. 12, 57, 58) which the postal authorities had refused to transmit by mail (R. 12, 55, 56) and which contained the said leaflet. Furthermore, the Federal officers found at headquarters a large number of en-

velopes stamped and addressed. All of these circulars were identified as having been printed by the Jewish World pursuant to Schenck's order (R. 25, 26, 55), and the identity of some of them at least was admitted by counsel (R. 55). The envelopes in question were mailed during the latter part of August (R. 46), some on August 20 (R. 40), some on August 26 (R. 42), and others on August 28 (R. 46, 50, 56).

The persons to whom these circulars had been mailed, including some of those who testified for the Government as having received or having been the addressees of these circulars, as well as the addresses on the envelopes which were found at the headquarters, corresponded to those who had been called before and accepted by the local draft boards and whose names had appeared in the daily papers and in the clippings from these daily papers which were found at defendants' headquarters and which will be found described in the record on pages 13, 14, 18.

The indictments included three named persons other than the two plaintiffs in error, but the cases against them were early dismissed by the Government and there is no need of referring to them by name. The indictment also included "other persons to this grand inquest unknown."

In the first count of the indictment the defendants Schenck and Baer and others were charged with willful and unlawful conspiracy to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the

United States, in that they did conspire to have printed and circulated the above-described circulars to men who had been called and accepted for military service under the provisions of the Selective Service Act, in violation of Section 3, Title I, of the Espionage Act (act of June 15, 1917, c. 30, 40 Stat. 217). Five overt acts to effect the object of the conspiracy were set forth, namely, the adoption and approval of the above-described resolutions of the executive committee, the arrangements for the printing and circulation thereof, and the mailing and distribution thereof as above described.

The second count of the indictment was for conspiracy to use and attempt to use the mails and Postal Service of the United States for the transmission of matter declared to be nonmailable by Section 2 of Title XII of the Espionage Act, namely, the said circulars which were charged to be nonmailable, in that they were calculated to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, and the same overt acts were set forth.

The third count of the indictment charged the substantive act of willfully and unlawfully using and attempting to use the mails and Postal Service of the United States for the transmission of said nonmailable matter.

The text of the sections of the Espionage Act upon which said charges were based, namely, Sections 3

and 4 of Title I, and Sections 1 and 3 of Title XII, are appended in the margin.[1]

The defendants were found guilty by the jury and the motion for a new trial was overruled.

The assignments of error in the record are very numerous, but in their brief the defendants have materially reduced the number of points upon which

[1] SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

SEC. 4. If two or more persons conspire to violate the provisions of section two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided, conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

TITLE XII.

SECTION 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: *Provided*, That nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

SEC. 3. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable shall be fined not more than $5,000 or imprisoned not more than five years, or both. Any person violating any provisions of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.

they rely. They attack the verdict and judgment of conviction upon the grounds:

1. That Section 3, Title I, of the Espionage Act is unconstitutional, as a violation of the First Amendment of the Constitution;

2. That the case against the defendant Schenck rests on evidence not properly admitted against him;

3. That there was an entire failure of evidence to connect the defendant Schenck with the conspiracy;

4. That as against defendant Baer there was no evidence whatever tending to demonstrate the commission by her of the alleged offense; and

5. That the case against both of the defendants depended upon evidence whose admission was in violation of the Fourth and Fifth Amendments of the Constitution.

The Government will answer these claims of the defendant in the same order, contending:

1. That Section 3, Title I, of the Espionage Act is constitutional, and this point of constitutionality raised by the defendants is so unsubstantial and frivolous that no appeal to the jurisdiction of this court may be predicated thereon;

2. That the case against the defendant Schenck is sufficient without the evidence objected to by the defendants, but that said evidence was properly admitted into evidence;

3. That there was ample proof to connect Schenck with the conspiracy;

4. That the evidence against the defendant Baer was sufficient to justify submitting the case against her to the jury; and

5. That the admission of evidence obtained by the execution of a search warrant did not infringe upon the Fourth and Fifth Amendments of the Constitution, and the constitutionality of such admission is so well settled by the decisions of this court, that the point raised by the defendants may be considered as too unsubstantial and frivolous to justify an appeal to the jurisdiction of this court.

I.

First amendment of the Constitution not involved in this case—Defendant's claim of unconstitutionality frivolous and unsubstantial and insufficient upon which to base an appeal to the jurisdiction of this court.

The defendants were charged with a conspiracy to distribute to men who had been accepted for the draft under the Selective Service Act, circulars advocating resistance to the draft. There was also a count upon the substantive offense of mailing such circulars. In substance, the defendants were charged with attempting to induce young men subject to the draft law to disobey the requirements of that law. The defendants chose as the recipients of the circulars young men who had been accepted by the draft boards and were simply awaiting the orders to report for duty. This in itself is sufficient to support the verdict of the jury that the intent of the defendants was to in-

fluence the conduct of persons subject to the draft and to influence that conduct in relation to the draft. Any such claim as that made in their brief, that they were engaged in a legitimate political agitation for the repeal of the draft law, is, of course, negatived by this fact that they chose men already drafted and called as the persons to whom to address their arguments.

The unlawful purpose of the defendants is further clearly shown by the text of the circulars. The circular originally had one side printed. That was an attack upon the constitutionality of the draft law, full of bitter language against conscription, as "A conscript is little better than a convict," etc. It did contain an appeal for the repeal of the law. That was not sufficiently strong to satisfy the defendants' purpose. The executive committee resolved "that 15,000 leaflets be written to be printed on the *other side* of the leaflet now in use to *be mailed to men who have passed exemption boards*, also distribution." What was this "other side," which was to be specially mailed to drafted men? It was entitled "Assert Your Rights." It was a frank, bitter, passionate appeal for resistance to the Selective Service Law.

The defendants cite a number of decisions in the district courts. Extensive discussion of them is unnecessary, as none hold Section 3 of Title I of the Espionage Act or any part thereof to be unconstitutional, and none of them hold that circulars

such as those used by the defendants do not violate that section. The defendants were charged with conspiracy both to cause insubordination, disloyalty, and neglect of duty in the military forces of the United States and to obstruct the recruiting and enlistment service. While, in the hundreds of cases which have arisen, there have been variations of opinion as to the meaning of "military forces of the United States," the meaning of "obstruct," and the meaning of "recruiting and enlistment service," there has not been one case in which acts of the nature of those charged against the defendant have been held to fall outside of the constitutional scope of the Espionage Act.

Amongst the numerous cases in the district courts some were for conspiracy, some for attempts, some for the completed substantive offenses; different clauses of the section itself were involved in the various cases; some involved the question whether the particular acts and utterances charged against defendants were of a nature to fall within the statute, whereas others involved the question of the sufficiency of proof of the unlawful intent or purpose with which the acts were committed or the utterances published. A short quotation from this or that charge to the jury would consequently be of little value unless bearing upon a question analogous to that involved in the case at bar.

In the case of *United States* v. *Eastman*, 252 Fed. 232, cited on pages 7 and 12 of the defendants' brief, the court upheld an indictment based on the publica-

tion of articles in a periodical. These articles did not, like the defendants' circulars, openly suggest or advise resistance to the draft law, nor was there proof of deliberate distribution amongst men subject to the draft. Nor did the court use the language quoted by the defendants. That language occurs in a decision of the same judge in *Masses Pub. Co.* v. *Patten*, 244 Fed. 535, which was overruled by the Circuit Court of Appeals in 246 Fed. 25.

The *Stokes* case, referred to on page 7 of the defendants' brief, involved a complex state of facts and a lengthy and elaborate charge to the jury, and the defendants' short reference thereto gives an entirely erroneous impression of the facts of that case and the views of the trial court.

The *Groeschl* case, referred to on page 8 of defendant's brief, is unreported, nor do the defendants state nor do we know any facts of that case regarding the persons to whom the circular was distributed.

As for *U. S.* v. *Hall*, 248 Fed. 150, it was not concerned with a conspiracy to cause insubordination, etc., nor with a constitutional question. There do not appear to have been any facts, as in the present case, showing the purpose and intent to influence men subject to the draft. So far as appears from the report, that case does not decide any of the questions involved in the instant case. The legal conclusions at which the district judge arrived in that opinion are contrary to those held by the overwhelming majority of district judges in cases arising under the Espionage act or by the Circuit Courts of

Appeal in the cases which have reached those courts. Amongst reported cases, see (District Courts):

Masses Publishing Co. v. *Patten*, 245 Fed. 102.
U. S. v. *Sugarman*, 245 Fed. 604.
U. S. v. *Pierce*, 245 Fed. 878.
Jeffersonian Pub. Co. v. *West*, 245 Fed. 585.
U. S. v. *Schaefer*, 248 Fed. 290.
U. S. v. *Boutin*, 251 Fed. 313.
U. S. v. *Prieth*, 251 Fed. 946.
U. S. v. *Nearing*, 252 Fed. 223.
U. S. v. *Eastman*, 252 Fed. 232.
U. S. v. *Nagler*, 252 Fed. 217.

(Circuit Court of Appeals:)

Masses Publishing Co. v. *Patten*, 246 Fed. 25.
U. S. v. *Krafft*, 249 Fed. 919.

As for the *Zimmerman* case mentioned on page 11 of the defendants' brief, the quotation is entirely irrelevant to the case at bar. Here two of the counts of the indictment are for conspiracy to accomplish a result, so that the proposition set forth in that quotation, namely, that in an indictment for willfully obstructing the recruiting and enlistment service, there must be proof that some individual was induced not to serve, is not relevant to the conspiracy counts and obviously not relevant to the count for the mailing of the circulars. The decisions of the district courts are overwhelmingly contrary to the opinion in the *Zimmerman* case; but, in view of the irrelevancy thereof to this case, we shall not burden this brief with quotations from other courts, except the follow-

ing from an opinion of the Circuit Court of Appeals in *U. S.* v. *Krafft*, 249 Fed. 919 at 924:

> Both "willfully causing" and "willfully attempting to cause" are by the statute made alike criminal; and, such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on theory that insubordination, mutiny, or disloyalty must be effected. To so hold would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination—in this case sown in August in Newark—at a later date in some camp sprang into life and brought forth fruit, but it was to prevent the seed from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty, to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include any one—for "whoever" is a broad inclusive word—who in any way willfully created or attempted to cause insubordination. Clearly the court below was right in holding that if in fact the defendant used the language alleged, and if his purpose was willful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that willful purpose to succeed.

The quotations from the *Olivereau* and *Ramp* cases on pages 13 and 14 of defendants' brief clearly support the Government's contention in the present case, and the remainder of the opinions in those cases would be found even more advantageous to these contentions. The following passage from the charge to the jury in the *Ramp* case (Bulletin 66, Interpretation of War Statutes, Department of Justice), defining the scope of the constitutional guaranty of free speech, is peculiarly appropriate:

> Reliance is had by the defendant upon the right of freedom of speech under the Federal Constitution for justification of his acts. That instrument does declare that Congress shall make no laws abridging the freedom of speech. The guaranty is a blessing to the people of this Government, and great latitude is preserved to them in the exercise of that right. But a citizen may not use his tongue or pen in such a way as to inflict legal injury upon his neighbor or use his own property to the detriment or injury of another. Nor has any person the right, under the guaranty of freedom of speech, to shape his language in such a way as to incite disorder, riot, or rebellion, because such action leads to a breach of the peace and disturbs good order and quietude in the community. Nor is he privileged to utter such language and sentiment as will lead to an infraction of law, for the laws of the land are designed to be observed and not to be disregarded and overridden. Much less has he the privilege, no matter upon

what claim or pretense, so to express himself with willful purpose as to lead to the obstruction and resistance of the due execution of the laws of the country, or as will induce others to do so. A citizen is entitled to fairly criticize men and measures—that is, men in public office, whether of high or low degree—and laws and ordinances intended for the government of the people, even the constitution of his State or of the United States; this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed or to which he is subjected. But when his criticism extends or leads by willful intent to the incitement of disorder and riot, or to the infraction of the laws of the land or the Constitution of this country, or, with willful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guaranty of the freedom of speech, and this because the very means adopted in an unlawful exercise of his privilege. Using the language of another, and adapting it to the present controversy: "The defendant, in common with all other citizens, has a perfect right, in good faith and for an honest purpose, to question the validity or constitutionality of a law affecting his property or his life, liberty, or happiness," but "neither the right of the citizen to resort to the courts for redress of his grievance nor his right to free speech as guaranteed by the Constitution confers any right, in the exercise

> of these great privileges, to use them as a medium through which to wantonly resist or obstruct the execution of the laws."

The constitutional point raised by the defendants corresponds to that raised in the Sugarman case (Case No. 345) set for hearing on the same day as this case. In the Government's brief in the Sugarman case, the frivolous and unsubstantial nature of this claim was discussed and we respectfully refer to that discussion. As there pointed out, this question has been foreclosed by the decisions of this court in the *Goldman, Baker,* and *Ruthenberg* cases in 245 U. S. 474. The Goldman and Baker cases were for conspiracy or attempts by means of speeches and circulars to induce young men of draft age not to register for the draft, and not upon any actual success in that attempt. The case at bar was similarly for an attempt to induce men of draft age to fail to comply with later stages of the draft process. The cases correspond, the only distinction being that they were brought under different statutes and relate to different stages of the duties of men subject to the draft—distinctions which have no relevance to the question of constitutionality.

This question of constitutionality must, therefore, be considered as settled by the decisions in this court, if authorities were needed for the proposition that the Congress of the United States has a constitutional right to prohibit a person from attempting during war to induce violations of a statute providing for military service. As pointed out in the Sugarman

brief, the contention is too well settled adversely to the defendants and too unsubstantial to form the basis of the jurisdiction of this court over this case.

II.

Admission into evidence against defendant Schenck of identification of minutes by defendant Baer was not error; and, as Schenck himself identified these minutes, the case was complete against him without any evidence of Baer's admissions.

The defendants complain that, as against the defendant Schenck, the admission into evidence of the defendant Baer's identification of the minutes of the Executive Committee was erroneous. The question is not important in this case, for Schenck himself identified these minutes, and the admission of Baer's statements, if erroneous, was not prejudicial error.

At the time of this identification, the distribution of the circulars was still in process, so that it can not be said that the conspiracy had terminated by the accomplishment or abandonment of its object, and cases against the admissibility of the declarations of a coconspirator made after the termination of the conspiracy are not in point.

In *United States* v. *Cassidy*, 67 Fed. 698 at 703, the court says:

> It is also true that any declaration made by one of parties during the pendency of the illegal enterprise is not only evidence against himself but against the other parties who, when the combination is proved, are as much responsible for such declarations and the acts

to which they relate as if made and committed by themselves.

Logan v. *United States*, 144 U. S. 263.
Fain v. *United States*, 209 Fed. 525.

In *Commonwealth* v. *Zuern*, 16 Pa. Super 588 at 604 (this case was cited in the defendant's brief), the court says:

> The rule has been held generally to be that the declarations of a conspirator are evidence against himself and are also evidence against his associates when they are made during the pendency of the fraudulent transactions which constitute the crime charged, for they then form a part of such transactions, but when not made during the progress or continuation of the fraudulent scheme, but afterwards, they are not evidence. * * *
>
> The question, whether or not a conspiracy has been proven, is for the jury, but it is manifest from a statement of the rule relating to the admission of declarations that there is some point to be reached in the trial at which a trial judge is called upon to decide whether sufficient proof of a conspiracy has been adduced to warrant the introduction of evidence of declarations of conspirators. All of the evidence in a cause can not, in the nature of things, be introduced at the same time nor can it be foreseen by the trial judge. Again, where many defendants are being tried, it becomes a difficult thing to determine whether a particular defendant has been, by preceding evidence, so connected with the alleged conspiracy as to warrant the admis-

> sion of proof of his declarations. The proof of the conspiracy at the point in the trial when the declarations are sought to be introduced need not be conclusive, but only slight, in order to permit the introduction. See *McDowell* v. *Rissell*, 37 Pa. 168. * * *. It has been held, and with some show of reason, that the fact that some of the acts and declarations of the conspirators were allowed to come in before proof was made of the conspiracy or of the defendant's connection with it, is no ground of objection, since the matter is largely discretional with the trial judge. 4 Am. and Eng. Ency. of Law (1st ed., p. 634).

But Schenck was himself general secretary of the organization and in charge of its headquarters, where the minutes were found, and he himself identified these minutes and the records of the organization which contained them (R. 13). It is therefore useless to pursue the discussion of the admissibility, as against him, of Dr. Baer's identification of these same minutes.

III.

Eliminating all statements of defendant Baer and all her connection with the conspiracy, there still remains complete proof of defendant Schenck's connection with and participation in the conspiracy.

The defendants contend that the minutes constitute the only proof of a conspiracy; that they were identified by the defendant Baer; that her

statement is not admissible against Schenck; that, therefore, there is as against Schenck no proof of the conspiracy; that there is no proof whatever connecting the defendant Baer with any conspiracy; that, therefore, there is no coconspirator with Schenck and hence no proof of a conspiracy.

Schenck himself identified the minutes, so Dr. Baer's statement regarding them may be eliminated. Later the Government expects to show that there is sufficient in the record to implicate Dr. Baer in the conspiracy. Eliminating, for the sake of argument, the defendant Baer altogether, anything she did or said or any testimony about her, there will then still be found in the record against defendant Schenck a complete case of conspiracy, which may be summarized as follows:

The executive committee of the Socialist Party of Philadelphia passed resolutions ordering the second side of the leaflet to be written and then printed on the leaflets then in use and mailed to men accepted by the draft boards. Schenck, general secretary of the organization and in charge of its headquarters, obtained a bid for the printing and reported it to the committee. The committee authorized him to expend moneys for mailing the circulars. He ordered 15,000 of the circulars. He reported to the executive committee that he had obtained the leaflets from the printer and had started the work of addressing envelopes and folding and inclosing the leaflets. In his desk were found newspaper clippings containing the names of men

who had been accepted by draft boards, which corresponded to men who received the circulars through the mails. Schenck arranged for this mailing by having the circulars and stamped envelopes at headquarters and instructing the young lady in attendance there to hand these circulars and stamped envelopes out on request. Persons came in from time to time, requested copies of the circular and the stamped envelopes and, in accordance with instructions from Schenck, received them. These persons who called for the circulars and envelopes are amongst the "other persons to this grand inquest unknown" mentioned in the indictment. At least from the time he obtained bids for the printing up to the time of his arrest, he was an active, in fact the most active, participant in the conspiracy. All this is clearly proven by testimony exclusive of anything said by or about Dr. Baer.

The authorities clearly permit the indictment of one conspirator without the indictment of others or without even identifying the co-conspirators by name (see *Hyde* v. *U. S.*, 225 U. S. 347). It is equally well settled that a man who joins a conspiracy by taking any part in the execution thereof is treated by the law as a co-conspirator.

In the famous case of *Spies* v. *People*, 122 Ill. 1, the court held (*syllabus*):

> The combination in the first instance may be established by evidence having no relation to the defendants, by acts of different persons at different times and places, by the writings

and speeches of such persons, and by any other circumstances which tend to prove its existence.

See 2 Wharton Criminal Law, eleventh edition, section 1655:

A conspiracy must be by two persons at least; one can not be convicted of it, unless he has been indicted for conspiring with named persons, or with persons to the jurors unknown. (Citing *U. S.* v. *Stone*, 188 Fed. 836; 1 Hawk. P. C., chap. 72; *Reg.* v. *Denton*, Dears. C. C. 3, 18 Q. B. 761, 21 L. J. Mag. Cas. N. S. 207, 17 Jur. 435; *Reg.* v. *Thompson*, 16 Q. B. 832, Dears. C. C. 2, 20 L. J. Mag. Cas. N. S. 183, 15 Jur. 435, 5 Cox, C. C. 166; *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306; *United States* v. *Cole*, 5 McLean, 513 Fed. Cas. No. 14,832, 1849; *Com.* v. *Irwin*, 8 Phila. 380, 1871.)

Section 1656:

It is in the discretion of the prosecution to include only as many of the alleged co-conspirators in the indictment as it may deem expedient; and the nonjoinder of any such, provided there is enough alleged on the record to constitute the offense *aliunde*, is not matter for exception. (Citing *Reg.* v. *Ahearne*, 6 Cox, C. C. 6; *Com.* v. *Demain*, Brightly, Pa. 441.) Nor is it necessary that a co-conspirator referred to either specifically or as a person unknown should be indicted. (Citing *Heine* v. *Com.*, 91 Pa. 145, 1879.)

Section 1660:

> An indictment charging the defendant with conspiring with persons unknown is good, notwithstanding the names of some of the persons alleged unknown must necessarily have transpired to the grand jury. (Citing *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122, 1830; *Reg.* v. *Steel*, Car. & M. 337, 2 Moody C. C. 246.)

Section 1674:

> Two or more defendants must be joined to constitute the offense: and if only two are joined, an acquittal of one is an acquittal of the other, *unless there be allegation and proof of co-defendants unknown.*
>
> See also *State* v. *Adams*, 1 Houston Cr. Cas. 361 (Delaware)
>
> *State* v. *Slutz*, 30 So. 298 (Louisiana).
>
> *United States* v. *Hamilton*, 26 Fed. Cas. 90.
>
> *Browne* v. *United States*, 145 Fed. 1; 200 U. S. 618

On the elementary proposition that one becomes a principal by entering into a conspiracy already formed or by aiding it or carrying out any part of it, see—

> 2 Wharton Criminal Law, 11th ed., secs. 1657, 1666;
>
> *U. S.* v. *Standard Oil Co.*, 152 Fed. 290;
>
> *U. S.* v. *Cassidy*, 67 Fed. 698.

Nor should the third count of the indictment be overlooked. It was for the substantive offense of mailing the circulars and is included in the jury's

general verdict of guilty. Schenck's part in this mailing is amply shown in the testimony of Miss Abramowitz.

IV.

The case against defendant Baer is sufficient to justify submission to the jury.

The defendants contend that there is a complete lack of evidence to connect the defendant Baer with the conspiracy. The following is a summary of the evidence in this connection on which the case was sent to the jury.

As testified by one of her attorneys, Mr. Nelson, Dr. Baer was a member of the Executive Committee (R. 62). She was also the recording secretary of the organization (R. 13, 14, 15, 38, 62). The seditious circular herein issued was printed on the back of a handbill circular previously issued by the Executive Committee. On August 13 the Executive Committee by formal resolution directed that 15,000 leaflets be written, be printed on the circular already in use, and be mailed to men who had passed exemption boards. In the same meeting by resolution the secretary was directed to get bids on the price of the leaflets (R. 18). During the next few days the defendant Schenck went to the printing office, left the copy for the seditious circular, and arranged for its publication. In the official minutes of a meeting of the Executive Committee, held August 20, appears the following notation under the head of "General Secretary's report":

> Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing same.

In the official minutes of this same meeting, under the head "Unfinished Business," appears the following resolution:

> M. and S. That comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried. (R. 19.)

It is obvious that the authority of the defendant Schenck to carry out the conspiracy came from the official resolutions adopted by the Executive Committee, and that he obtained authority to incur the expense ($125) for this purpose from the official resolution so adopted. The recording of these official minutes was an essential part of the conspiracy. The defendant Baer herself admitted that the minutes of these two meetings were in her handwriting and that the four typewritten pages taken out of the official minute book were the same minutes. She referred to both sets of minutes as "hers" (R. 14, 15). The case of participation in the conspiracy against her is, of course, partly circumstantial, but proof of conspiracy generally is of a circumstantial character.

See *Marrash* v. *U. S.*, 168 Fed. 225, where, on a charge of conspiracy to defraud the United States of customs duties, an importer was held properly convicted when the whole case against him consisted of the fact that he was the consignee, was the addressee of letters from the exporters setting forth the fraudu-

lent scheme, and displayed alarm when there were indications that the fraudulent concealment of laces in a shipment marked as nuts would be dicsovered. The court at page 229 used the following language:

> It is argued that there was no direct evidence of conspiracy and the circumstantial evidence was insufficient to warrant a conviction. Under section 5440 it was necessary to prove that two or more of the defendants, Selim Marrash and George Sara, for instance, conspired to defraud the United States of duties lawfully due on imported laces, and that either Marrash or Sara did an act to carry it out. It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret, and clandestine. It is enough that hey have a common purpose to defraud and that they act together for that purpose.
>
> It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others. It is manifest, therefore, that in many and, indeed, in most cases of conspiracy the corrupt agreement is proved by circumstantial evidence. Such evidence must, of course, satisfy the jury beyond a reasonable doubt, but in this respect there is no distinction between circumstantial and direct evidence.

See also

U. S. v. *Babcock*, Fed. Cas. No. 14,487.
U. S. v. *Hamilton*, Fed. Cas. No. 15,288.
U. S. v. *Hutchins*, Fed. Cas. No. 15,430.
U. S. v. *Logan*, 45 Fed. 872.
Davis v. *U. S.*, 107 Fed. 753.
2 Wharton Criminal Law, 11th Ed., Sec. 1665.

There can be no reasonable doubt that the action of the Executive Committee constituted the conspiracy. One of the necessary and essential steps to carrying out the conspiracy was the recording in the official minutes of that committee of the unlawful resolutions. One becomes a principal by entering into a conspiracy already formed and becomes responsible for the acts of the other conspirators.

See

U. S. v. *Standard Oil Co.*, 152 Fed. 290.
U. S. v. *Cassidy*, 67 Fed. 698.
Logan v. *U. S.*, 144 U. S. 263.

It is respectfully submitted that upon all the facts the court was warranted in submitting to the jury the question of the participation by the defendant Baer and that there was sufficient to warrant the conclusion reached by the jury.

V.

The admission in evidence of documents seized on a search warrant does not infringe the fourth and fifth amendments to the Constitution, and the constitutionality of such admission is so well settled that the defendants' claim to the contrary is frivolous and, consequently, insufficient as a basis of jurisdiction of the Supreme Court of the United States.

The point raised in the defendants' brief relating to the constitutionality of the use of evidence obtained by search warrant is, by their own admission, authoritatively settled against them, for after discussing several cases, they conclude on page 30 of their own brief as follows:

> Although the Constitution says that no person shall be compelled in any criminal case to be a witness against himself, it seems that judicial decision has modified the exact words of the Constitution to mean that no person shall be compelled in a criminal case to be a witness against himself, provided this testimony is verbal. If, however, he should be unfortunate enough to write something or save some printed matter, the rule no longer holds; and he can be convicted out of his own mouth, just as if the Constitution never said anything about the matter.
>
> There is no doubt that the cases show the general rule is that evidence obtained by means of a search warrant is not inadmissible, either on the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself.

This conclusion is correct, having been settled by the case of *Adams* v. *New York*, 192 U. S. 585, in which this court held (syllabus):

> The fact that papers, which are pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence and not the method by which it was obtained.
>
> There is no violation of the constitutional guaranty of privilege from unlawful searches and seizures in admitting as evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment; and by the introduction of such evidence defendant is not compelled to incriminate himself.

This doctrine was affirmed in the case of *Weeks* v. *U. S.*, 232 U. S. 383, cited by the defendants. There the evidence had been obtained without any search warrant and by completely illegal seizure and the defendants had duly sought to obtain a return thereof. This court held under such circumstances that the information obtained from such evidence could not be used against the defendants, but reaffirmed the principle of the Adams case, saying in the syllabus in explanation of that case:

> While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence, may be justified, and a collateral issue will not be raised to ascertain the source of competent

evidence, *Adams* v. *New York*, 192 U. S. 585, that rule does not justify the retention of letters seized in violation of the protection given by the fourth amendment where an application in the cause for their return has has been made by the accused before trial.

And in the text of the opinion, page 395:

Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the fourth and fifth amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, section 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many State cases were cited supporting that doctrine.

The Adams case was concerned with evidence unlawfully obtained, because falling outside of the scope of the search warrant. The Weeks case was concerned with papers illegally seized without any warrant at all, colorable or otherwise. In the case at bar, the evidence objected to by the defendants was within the scope of the search warrant, so that there is nothing whatever in the record tending to show the seizure thereof to have been unlawful. The defendants attempted in their brief to claim that there had not been a sufficient showing of probable cause before the court which issued the warrant. This is certainly, however, a collateral issue into which the trial court could not be asked to enter during the trial of the criminal case itself, nor does the record disclose what may or may not have been the showing upon which the search warrant had been issued. See *Flagg* v. *U. S.*, 233 Fed. 481. Certainly the discovery in the mails of six hundred of these seditious circulars, many of them mailed to men accepted for the draft, was a sufficient probable cause to justify a warrant for the search of the headquarters of the organization which had issued them.

The constitutional point having, as admitted by them, been settled against the defendants by the decisions of this court, is obviously too unsubstantial and frivolous upon which to predicate the jurisdiction of this court.

Lampasas v. *Bell*, 180 U. S. 276.
Farrell v. *O'Brien*, 199 U. S. 89.
Brolan v. *U. S.* 236 U. S. 216.

CONCLUSION.

There are no errors apparent on the record, but, by reason of the jurisdictional defect disclosed by the defendant's brief, the petition in error should be dismissed.

JOHN LORD O'BRIAN,
The Special Assistant to the
Attorney General for War Work.

ALFRED BETTMAN,
Special Assistant to the Attorney General.

JANUARY, 1919.

O

SCHENCK *v.* UNITED STATES.

BAER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 437, 438. Argued January 9, 10, 1919.—Decided March 3, 1919.

Evidence *held* sufficient to connect the defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917. P. 49.

Incriminating documents seized under a search warrant directed against a Socialist headquarters, *held* admissible in evidence, consistently with the Fourth and Fifth Amendments, in a criminal prosecution against the general secretary of a Socialist party, who had charge of the office. P. 50.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done. P. 51.

A conspiracy to circulate among men called and accepted for military service under the Selective Service Act of May 18, 1917, a circular tending to influence them to obstruct the draft, with the intent to effect that result, and followed by the sending of such circulars, is within the power of Congress to punish, and is punishable under the Espionage Act, § 4, although unsuccessful. P. 52.

The word "recruiting" as used in the Espionage Act, § 3, means the gaining of fresh supplies of men for the military forces, as well by draft as otherwise. P. 52.

The amendment of the Espionage Act by the Act of May 16, 1918, c. 75, 40 Stat. 553, did not affect the prosecution of offenses under the former. P. 53.

Affirmed.

THE case is stated in the opinion.

Mr. Henry John Nelson and *Mr. Henry J. Gibbons* for plaintiffs in error.

Mr. John Lord O'Brian, Special Assistant to the Attorney General, with whom *Mr. Alfred Bettman*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempt-

ing to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On

August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams* v. *New York*, 192 U. S. 585; *Weeks* v. *United States*, 232 U. S. 383, 395, 396. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch Street and it would seem that the documents technically were not even in the defendants' possession. See *Johnson* v. *United States*, 228 U. S. 457. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt* v. *United States*, 218 U. S. 245, 252, 253.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a

convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the

main purpose, as intimated in *Patterson* v. *Colorado*, 205 U. S. 454, 462. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman* v. *United States*, 245 U. S. 474, 477. Indeed that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The

words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. Stats., § 13.

Judgments affirmed.